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IN THE

Supreme Court of the United States

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS, ABIGAIL RICHLIN SCHWARTZ, LOUISE RICHLIN, ELYSSA PARTON and MICHELLE FORKEL

Petitioners,

v.

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case, concerning the film *The Pink Panther*, presents several interesting, important and unresolved questions of copyright law that occur frequently and have split the circuit and district courts.

1. The Copyright Act of 1976 provides that "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole" are deemed "joint works" and the authors "co-authors." 17 U.S.C. § 101 (1976).

Is the author of an unpublished original story adapted into a motion picture a co-author of the resulting film?

a. Must the co-authors make "objective manifestations of a shared intent to be joint authors"?

b. Must the co-author "superintend the work by exercising control" over the final product?

c. What amount of contribution is required to be a co-author of a motion picture?

2. Section 24 of the 1909 Copyright Act (as extended by section 304(a) of the 1976 Copyright Act) grants two consecutive terms of copyright for works created before 1978. Under this two-term scheme, if an author dies during the first term and before renewal, a statutory successor is entitled to renew, even if the author purported to assign the renewal period. *Stewart v. Abend*, 495 U.S. 207, 218, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990). In *Stewart*, an author of a story published in a magazine assigned his rights to producers of the film *Rear Window*. The Court held that the author's statutory successor was entitled to renewal term rights in the story and could prevent distribution of the film without a new license.

Does the rule in *Stewart* also apply to a *previously unpublished story* that is assigned to a motion picture producer for adaptation into a film?

LIST OF PARTIES

Petitioners Bradley Richlin, Lance Richlin, Mark Mannis, Abigail Richlin Schwartz, Louise Richlin, Elyssa Parton and Michelle Forkel are individuals.

Respondent Metro-Goldwyn-Mayer Pictures Inc. ("MGM") is a Delaware corporation, with its principal place of business in Los Angeles, California.

Respondent Geoffrey Productions, Inc. ("Geoffrey") is a California corporation, with its principal place of business in Los Angeles, California.

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OPINIONS BELOW

The June 19, 2008 Opinion of the Court of Appeals ("the Opinion") is reported at 531 F.3d 962 (9th Cir. Cal. 2008), and is reprinted in the appendix to this petition, at App. 1a to 33a. The summary judgment of the district court was unreported and is reprinted in the Appendix at App. 34a to 45a.

STATEMENT OF JURISDICTION AND STANDING

The Opinion of the Ninth Circuit was entered on June 19, 2008. A timely petition for re-hearing and suggestion for rehearing en banc was denied on August 29, 2008. This petition for certiorari was filed within ninety (90) days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8 of the Constitution, sections 3 and 10 of the 1909 Copyright Act, and sections 101 and 304 of the 1976 Copyright Act are reprinted in the Appendix at App. 48a to 61a.

STATEMENT OF THE CASE

> *When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work. That is how the separate renewal term was intended to operate.*

Stewart v. Abend, 495 U.S. 207, 229, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990).

INTRODUCTION

The Ninth Circuit denied the renewal term rights of heirs of the author of the original 14-page story treatment adapted into the film *The Pink Panther* on the grounds that (1) the author of the original story treatment was not a co-author of the resulting motion picture, App. at 18a, and (2) the author's heirs possessed no renewal term rights because "[the author] failed to secure federal statutory copyright protection for the Treatment" prior to its assignment to the producer. App. at 32a. The court conceded that "the Motion Picture adopted the characters and original story from the Treatment, and [], absent the Treatment, the Motion Picture likely would not exist." App at 17a. Further, the court agreed that "the Motion Picture's federal statutory copyright protection extended to those copyrightable elements of the Treatment that were published as components of the Motion Picture." App. at 24a. Nevertheless, the court apparently could not find a way to afford the author's heirs the renewal

rights guaranteed by statute and affirmed in *Stewart*. Perhaps not since the Second Circuit's ill-fated opinion in *Rohauer*[1] has a Circuit Court so boldly and wrongly attacked the centuries-old right of an author's heirs to participate in the fruits of the author's creative work during the copyright renewal period. Review is necessary, not only to correct the result in this case, but also to resolve several circuit splits concerning joint authorship that contributed to the mistaken ruling.

SUMMARY OF THE CASE

Appellants are the heirs and successors of Maurice Richlin, the acknowledged co-author (with Blake Edwards) of the original story treatment for the film *The Pink Panther*. Richlin and Edwards wrote the 14-page treatment ("Treatment") for *The Pink Panther* in April 1962. Appendix 71a-84a. The Treatment was not a work made for hire. One month later, in May 1962, Richlin and Edwards assigned their rights in the Treatment to a producer, The Mirisch Corporation of Delaware ("Mirisch"). Appendix 62a-70a. Mirisch hired Richlin and Edwards to write the screenplay based on the Treatment, which was then used to make the 1963 film *The Pink Panther*. In subsequent *Pink Panther* films, Richlin and Edwards were credited with creating the original story and characters. Richlin died in 1990, during the first 28-year term of copyright for the film. Petitioners MGM and Geoffrey (successors to Mirisch) renewed the copyright in *The Pink Panther* in 1991.

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1. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), cert. denied, 431 U.S. 949, 97 S. Ct. 2666, 53 L. Ed. 2d 266 (1977), later overruled in *Stewart v. Abend*, 495 U.S. at 218.

In 2004, in the course of creating a new sequel to *The Pink Panther*, MGM contacted Richlin's widow, Louise Richlin. After several of Mrs. Richlin's children spoke with counsel, Petitioners discovered that they could assert rights in the renewal copyright for *The Pink Panther*, under the rule set forth in *Stewart* (holding that executor of author who died during first copyright term held rights to renewal term copyright in story used in film even though author had purported to assign those renewal rights).

In *Stewart*, the original story had been published in a magazine prior to its assignment by the author to the producers of the motion picture. In the case of *The Pink Panther*, the original story was not previously published, but was assigned as an unpublished story treatment and then developed into the motion picture. There was before the present litigation no authority suggesting that prior separate publication of the story was a prerequisite for making a *Stewart*-type renewal term claim. Indeed, prior Ninth Circuit authority held that an unpublished story became a "component part" of the resulting film and was therefore included in the statutory copyright for the motion picture. *Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998) (holding that underlying screenplay was "published" with film and fell into public domain when copyright was not renewed); *accord Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586 (2d Cir. 1999).[2]

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2. The Copyright Office also has refused to issue a separate renewal copyright in an underlying screenplay when the motion picture copyright has been renewed. *Husbands*, Copyright Office Board of Appeals Letter, Control No. 10-600-754-2(C), at 6 (May 14, 2002), *available at* http://www.ipmall.info/hosted_resources/CopyrightAppeals.

Given the above authorities holding that an unpublished underlying work (screenplay) was incorporated as a component of the resulting film, it seemed logical to conclude that Richlin's contribution of the unpublished treatment to the film project made him a co-author of the resulting film — rather than the author of an underlying work (story) on which a new derivative work (film) was based. *See Bencich v. Hoffman*, 84 F. Supp. 2d 1053 (D. Ariz. 2000) (author of treatment was co-author of screenplay adaptation). Therefore, the heirs claimed rights as co-authors of the film, as well as co-authors of the Treatment.

In any case, whether as heirs of a co-author of the Treatment, or of the film, the heirs could claim an interest in the renewal term copyright of the film because, under *Stewart*, Richlin's purported 1962 assignment of his renewal rights was ineffective. When Richlin died before the copyright was renewed, Richlin's renewal rights vested instead in Richlin's heirs, rather than in the producers by way of Richlin's assignment.

However, unlike in *Stewart*, Appellants did not seek to assert ownership over the renewal copyright itself. Because Edwards, a co-author of the Treatment with Richlin, survived until the renewal term, Edwards' original 1962 assignment of renewal rights had given MGM and Geoffrey the non-exclusive right to renew the Treatment copyright in 1991. Further, if Richlin was a co-author of the film, the same rule would apply, and the other co-authors MGM and Geoffrey could renew the film copyright for all the rights-holders. However, that renewal created a constructive trust in favor of the non-renewing co-owners of the renewal term rights, the

Richlin heirs. *See Selznick v. Turner Entertainment Co.*, 990 F. Supp. 1180 (C.D. Cal. 1997) ("the co-owner claiming the renewal takes legal title to the renewal copyright as constructive trustee on behalf of the non-renewing co-owner"); *see also Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988) (Ginsburg, J.), *aff'd* 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989). Therefore, under *Selznick*, the Richlin heirs filed the present action seeking declaratory relief and an accounting of profits derived by Appellees from the renewal copyright for *The Pink Panther* and its related properties.

On February 15, 2006, the district court granted summary judgment for Respondents and entered judgment against Petitioners, in an unreported opinion, finding that Richlin was not a "joint author" of the motion picture and that his heirs could not claim an interest in the film's renewal copyright. App. at 34a-45a. The district court did not address or consider whether Petitioners could make a claim for relief even if Richlin were not considered a "joint author" of the motion picture.

On June 19, 2008, the United States Court of Appeals for the Ninth Circuit upheld the district court's opinion, finding that Richlin was not a co-author of the film, despite the fact that he wrote the story on which it was based, because (1) there were no "objective manifestations of a shared intent to be joint authors" and (2) Richlin did not "superintend the work by exercising control" over the final product. App. at 10a-18a. The court further held that Richlin's heirs

possessed no renewal rights because the story Treatment was not published "as such" and therefore was never the subject of federal copyright protection. App. at 18a-33a.

REASONS FOR GRANTING THE PETITION

1. Certiorari Is Warranted To Resolve Several Circuit Splits On The Question Of Joint Authorship And To Repel The Ninth Circuit's Attack On *Stewart*.

The Opinion in this case is in part the result of what one author had already called "[a] substantial split between the courts of appeals of the United States and substantial confusion among the district courts . . . with respect to the test for determining 'joint works' or 'co-authorship' under the Copyright Act of 1976." Gorman, "Who Owns the Movies?", 7 UCLA Ent L. Rev. 1 (Fall 1999). Because joint authorship determinations affect the duration of copyright under section 302(c), renewal term interests under section 304(a) and termination interests under section 304(c), the splits discussed below are of increasing importance and involve the leading circuits that administer copyright law for the music, book and magazine publishing, motion picture, television and related industries. Indeed, because of the great uncertainty in the law, "joint authorship has become a popularly litigated issue in copyright law." Yarbrough, "What's Mine Might Be Yours: Why We Should Rethink the Default Rule for Copyright Co-ownership in Joint Works", 76 Tul. L. Rev. 493, 495-496 (2001). The decision in this case therefore raises important questions of federal law that have not been, but should be, settled by this Court.

A. The Court Should Resolve Various Circuit Splits Concerning The Rules For Determining Joint Authorship.

The Copyright Act of 1976 provides that "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole" are deemed "joint works" and the authors "co-authors."[3] 17 U.S.C. § 101 (1976); *Community*, 490 U.S. at 753. On the face of it, *The Pink Panther* motion picture would appear to be a work of joint authorship with Richlin as one of the co-authors. Richlin clearly prepared the Treatment with the intent that it be merged with the work of others into an inseparable and interdependent part of a unitary whole. Indeed, Richlin assigned the Treatment to the producer Mirisch with the express understanding that Mirisch would adapt Richlin's work into a motion picture. App. at 13a. Why then did the Ninth Circuit find that Richlin was not a co-author of the resulting film?

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3. [A] work is 'joint' if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.' The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit. . . .

S. Rep. No. 94-473, 94th Cong., 1st Sess. at 103 (1975).

The Ninth Circuit — alone among the various circuit courts that have opined on the issue — has established a three-pronged test that purports to help determine who can be called an author of a joint work. As the court below explained,

> In *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000), we set forth three criteria for determining whether a work is jointly authored under § 101. First, we determine whether the 'putative coauthors ma[de] objective manifestations of a shared intent to be coauthors.' *Id.* A contract evidencing intent to be or not to be coauthors is dispositive. *Id.* Second, we determine whether the alleged author superintended the work by exercising control. *Id.* Control will often be the most important factor. *Id.* Third, we analyze whether 'the audience appeal of the work' can be attributed to both authors, and whether 'the share of each in its success cannot be appraised.' *Id.* (quotations omitted). App. at 12a-13a.

The Ninth Circuit's three-prong test has not been followed by other circuits, and with good reason.[4] The Ninth Circuit has improperly constricted the definition of an author of a joint work provided in section 101.

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4. One commentator has called the Ninth Circuit's approach "strikingly different" from the approach taken by the other circuit courts. Yarbrough, 76 Tul. L. Rev at 508.

1. Must the co-authors make "objective manifestations of a shared intent to be joint authors"?

This first prong of the test stems from the Ninth Circuit's misreading of authorities from the Second and Seventh Circuits, which held that an expressed intent *not* to be joint authors was relevant in determining co-authorship. *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). For example, in *Thomson*, the playwright "had been adamant throughout [the play's] creation on being the sole author," and had hired the drama professor for "dramaturgical assistance and research" only. *Aalmuhammed*, 202 F.3d at 1234; *Thomson*, 147 F.3d at 197. Therefore, the holding was based on the fact that the contributors expressly did not intend to be joint authors, not on the failure of one party to prove a mutual expressed intent to share authorship credit.

The Ninth Circuit erroneously extended these holdings to cases where there was no clearly expressed intent regarding co-authorship. In both *Aalmuhammed* and the Opinion below, there was no evidence at all that any party manifested an intent *not* to be a co-author.[5] Nevertheless, the Ninth Circuit construed the supposed

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5. Indeed, in this case there were in fact objective indications that Richlin intended to be the author of the film. For example, the first page of the Treatment says "THE PINK PANTHER By Maurice Richlin & Blake Edwards". App. at 62a. Further, in the Assignment, Richlin granted Mirisch "the right to use my name as the author of the literary composition upon which said adaptations, or any of them, are based." App. at 77a.

silence on the issue of co-authorship as an argument against co-authorship.[6]

The error of the Ninth Circuit's approach can be demonstrated by the numerous other joint authorship cases where there was never any objective manifestation of intent to be joint authors. *Maurel v. Smith*, 271 F. 211 (2d Cir. 1915) (author of scenarios was joint author of opera composed by Victor Herbert); *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946) (song published with new lyrics was a "joint work" and authors of music and lyrics were "joint authors," both entitled to renewal copyright), *citing Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944) (publisher bought lyrics

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6. The Ninth Circuit, in a startling *non-sequitur*, also construed the transfer of rights of *ownership* in the Assignment, as a manifestation of intent concerning *authorship*. App. at 14a-15a ("we agree with the district court that when Richlin and Edwards conveyed all present and future interests in the Treatment and derivative works to Mirisch, the parties to the contract could not consistently entertain the intent that Richlin and Edwards would be coauthors of the Motion Picture"). The conclusion of course does not follow logically at all. An assignment of ownership rights in a copyrightable work cannot possibly divest the author of his role as an author of the work. Similarly nonsensical is the court's assertion that Richlin's subsequent contribution of the screenplay as a work made for hire demonstrates an intent not to be a co-author of the film. App. at 15a. The claim of co-authorship stems, not from Richlin's work on the screenplay, but from his authorship of the Treatment, which was not a work made for hire. Should Richlin be any less of an author because he also worked on the screenplay, besides authoring the original Treatment?

and added music to form "joint work," and both authors were entitled to renewal copyright); *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (contributor of comic book text was co-author of Spawn character); *Siegel v. Warner Bros. Entertainment Inc.*, 496 F. Supp. 2d 1111, 1144-49 (C.D. Cal. 2007) (finding Superboy comic to be joint work even though author of text did not consent to use of his work).

2. Must the co-author "superintend the work by exercising control" over the final product?

The Ninth Circuit in *Aalmuhammed* considered the superintending or control factor to be the "most important," supposedly relying on *Burrow-Giles Lithographic Co. v. Sarony*, 11 U.S. 53, at 58-61, 4 S. Ct. 279, 28 L. Ed 349 (1883) (holding that a photographer, and not his subject or the lithographer, was the "author" of an image entitled to copyright). *Aalmuhammed*, 202 F.3d at 1234.[7]

However, as the district court in *Berman v. Johnson*, 518 F. Supp. 2d 791 (D.Va. 2007) has recently pointed out, there is a "circuit split" between the Ninth Circuit (*Aalmuhammed*) on the one hand, and the Second and

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7. In *Aalmuhammed*, the Ninth Circuit interpreted language in *Burrow-Giles* to mean that an author is "the person to whom the work owes its origin and who superintended the whole work, the 'master mind'" *Aalmuhammed*, 202 F.3d at 1233, *citing Burrow-Giles*, 111 U.S. at 61 (quoting *Nottage v. Jackson*, 11 Q.B.D. 627 (1883)). The Ninth Circuit did not explain why it believed "superintending" was more important than "originating".

Seventh Circuits (*Thomson* and *Erickson*), on the other hand, with respect to the level of control required to be considered a joint author. *Berman*, at 796-97. The district court in *Berman*, sitting in the Fourth Circuit, sided with the Second and Seventh Circuits, and against the Ninth Circuit approach, finding that control was not the most significant factor in determining joint ownership. *Id.* at 797.

The definition of authorship provided in *Aalmuhammed* clearly does not encompass all of the works that have been considered joint works of authorship. For example, neither the composer nor the lyricist of the songs at issue in *Edward* or *Shapiro* "superintended the work by exercising control" over the final product. The Ninth Circuit has overemphasized the control factor, which is, as *Berman* demonstrates, "susceptible to inequitable manipulation." *Berman*, at 797; *see also Siegel*, 496 F. Supp. 2d at 1144-49.

The Ninth Circuit also failed to distinguish between cases where an author who originally has control of the work chooses to assign the unfinished work to another (*Maurel, Edward, Shapiro, Richlin, Bencich*) and cases where the putative co-author is merely a contributor to an ongoing project originated and controlled by others (*Burrow-Giles, Aalmuhammed*).

3. What amount of contribution is required to be a co-author of a motion picture?

Judge Posner's decision in *Gaiman* has created a circuit split on the question of whether a joint author's contribution must be separately copyrightable. *Gaiman*, 360 F.3d at 658-59; *see also* Huang, "*Gaiman v. McFarlane*: The Right Step in Determining Joint Authorship for Copyrighted Material", 20 Berkeley Tech. L.J. 673 (2005). Judge Posner reasoned that if two people set about to create a work together, it should not matter whether one or the other separately produced a copyrightable element. In doing so, Judge Posner aligned himself with Prof. Nimmer (Nimmer & Nimmer, *Nimmer on Copyright*, § 6.07 (2007)) and against Prof. Goldstein (Paul Goldstein, *Copyright: Principles, Law, and Practice* 4.2.1.1 (2d ed. supp. 2004)). Prof. Goldstein's approach, requiring each co-author to have contributed a separately copyrightable element, as well as an intent to share authorship, has been adopted by the other circuit courts in *Thomson*, *Erikson*, *Childress*, and *Aalmuhammed*. However, the Posner-Nimmer approach more closely tracks the language of the Copyright Act. The adoption of the Goldstein approach demonstrates the eagerness of the circuit courts to look beyond the plain meaning of the statute to impose conditions and limitations on authorship.

By emphasizing certain indicia of authorship over others, the circuit courts have strayed from the broader, more flexible definition set forth by the Court in *Burrow-Giles* and codified in section 101. In *Burrow-Giles*, the question was who was the author of a photograph: the

person who sets up and snaps the picture, or the person who develops the photographic plate and turns it into a lithograph? The Court decided that the photographer was the author, and mentioned a number of different factors: the author is "the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be - the man who is the effective cause of that"; "'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected"; "the man who really represents, creates, or gives effect to the idea, fancy, or imagination." *Burrow-Giles*, 111 U.S. at 61 (quoting *Nottage v. Jackson*, 11 Q.B.D. 627 (1883)). The Court said that an "author," in the sense that the Founding Fathers used the term in the Constitution (U.S. Const. Art. 1, § 8, cl. 8), was "'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'" *Burrow-Giles*, at 58 (quoting Worcester).

The harm of the Goldstein approach can be seen in the present case. Although it was undisputable that Richlin originated the entire project, created the story and characters[8] and made a separately copyrightable, significant, indeed seminal, contribution to the film (the Treatment), the court considerably discounted these arguably most important indicia of authorship, declaring

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8. Fictional characters are themselves copyrightable. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (L. Hand, J.); *Gaiman*, 360 F.3d at 660 (noting that Ninth Circuit's contrary decision in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945 (9th Cir. 1954) was "killed" in *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1452 and n. 7 (9th Cir. 1988)).

them out-numbered. Although Richlin clearly satisfied the statutory conditions for joint authorship in section 101, the manufactured requirements of "shared intent" and "superintending and control" were allowed to outweigh all other considerations. Review is necessary to resolve this issue and the conflicting interpretations by the circuit courts of the requirements for joint authorship.

B. The Opinion's Requirement That The Author Secure A Prior Separate Copyright In The Treatment Conflicts With *Stewart*.

The result reached by the Ninth Circuit is not "how the separate renewal term was intended to operate." *Stewart*, 495 U.S. at 229. As stated earlier by the Ninth Circuit in *Marascalco v. Fantasy, Inc.*, 953 F.2d 469 (9th Cir. 1991), "The legislative history and the cases reflect that the core concern of [17 U.S.C.] § 304(a) is to provide the author and his statutory successors with a new opportunity to enjoy the benefits of a creative work that proves successful." *Id.* at 475. The Ninth Circuit inexplicably denied Richlin's heirs the benefit that section 304(a), and its precursors, were expressly designed to provide.

Contrary to the court's glib suggestion at the outset of the Opinion, the case is not about ownership, but **authorship**. By confusing the two distinct issues, the Ninth Circuit arrives at a result that cannot be reconciled with existing law, especially *Stewart*.

The proper place to begin is the second portion of the Opinion, beginning at App. 18a, which discusses Appellants' core argument based on *Stewart*, *Batjac* and

Selznick. From App. 18a-22a, (pp 19-24), the analysis is correct. Richlin and Edwards were co-authors of the Treatment, who assigned their common law copyright to Mirisch. This made Mirisch the *owner* of the Treatment, and the story and characters described therein, but not their *author*.

The distinction is crucial, because renewal rights stem from *authorship*, not *ownership*. The applicable renewal statute, 17 U.S.C. §304(a), provides, after excluding works made for hire and corporate works, that the **author** or his heirs may seek a renewal term copyright in the case of "**any other copyrighted work**," including "a contribution by an individual author to a periodical or to a cyclopedic or other composite work." The statute therefore specifically recognizes that a renewal copyright may be claimed by the **author** or his heirs, even where (as in the case of a composite work, for example) there is no separately recorded original copyright registration identifying the author's work.

Indeed, this was the case in *Stewart*, where the initial publication of the author's story took place in a magazine under a blanket copyright provided by the magazine publisher. At the time of the transfer to the film producer, there was no "separate" copyright in the story "as such," and no registration naming the author as owner of the copyright in his story. *Cf.* App. at 24a. Nevertheless, in an opinion authored by the Ninth Circuit, and on this point not reviewed by the Supreme Court, the author's heir was entitled to a renewal term copyright in the story. The Ninth Circuit noted that the legislative reports "clearly evince Congress' intent to provide the author of the contribution [to a periodical]

with a right of renewal." *Abend v. MCA, Inc.*, 863 F.2d 1465, 1471-1472 (9th Cir. 1988) ("section 24 [predecessor to §304(a)] gives the author of a contribution to a periodical a right of renewal with respect to that contribution, **even when the author has not separately copyrighted the contribution**." (emphasis added)).

There is an overriding intent evidenced in the various renewal statutes — dating back to colonial times! — to afford authors and their heirs the broad, unfettered right to a separate renewal term copyright in their works. *Marascalco*, 953 F.2d at 471-72. The rationale for the renewal provisions has been repeatedly confirmed. *See Marascalco*, 953 F.2d at 474, quoting *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 654, 63 S. Ct. 773, 87 L. Ed. 1055 (1943)

> . . . It not infrequently happens that the author sells his copyright outright to a publisher for a small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years [the original copyright term] . . . it should be the exclusive right of the author to take the renewal term . . .

Quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess., 14-15 (1909). The legislative history of the 1976 Act echoes this concern when it describes the renewal term as "a completely new property right" from which an author and his dependents should have a chance to benefit. *Marascalco*, 953 F.2d at 474, citing H.R. Rep. No. 1476, 94th Cong., 2d Sess., 140 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5756.

The Ninth Circuit is therefore wrong in concluding that an author who assigns his unpublished work to a film producer is not entitled to a renewal term interest in his work if it is not published "as is."[9] Essentially, the court asserts that following publication of the film, the author's contribution (i.e. the story and characters from the Treatment) was not a "copyrighted work" subject to renewal, in the sense of section 304(a). App. at 24a-28a. But the conclusion is wrong — the term "any other copyrighted work" in section 304(a) must necessarily *include* a work that is first published and copyrighted as component of another, larger work.

To justify its position, the Ninth Circuit invented a presumed distinction between a copyright protecting all the components of a work, and a copyright in the component parts, as if the two were mutually exclusive. App. at 25a, 30a. There is no citation provided by the court, nor is there any justification for its illogical conclusion. Indeed, the renewal statute, section 304(a), provides for a renewal term copyright for "any other copyrighted work," even for contributions to periodicals or other composite works. Why not for contributions to a film? Why not for a treatment, song or screenplay contributed to a motion picture? What policy goal is served by such a distinction, which appears nowhere in the statute or in any case prior to this one? Why on earth should it matter to Richlin or his heirs whether or not he published his Treatment separately before assigning

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9. The conclusion of the Ninth Circuit that the author's heirs have no renewal rights in the Pink Panther story means that the author himself, were he alive, would also not have any renewal rights, making the transfer of such rights in the Assignment meaningless. App. at 31a.

it to the producer? Is there any legislative history supporting such a large exception to the law affording renewal term rights? Is there any statutory basis at all for this exception created by the Ninth Circuit from whole cloth?

This is not a minor point affecting just one case, but a very large one that is likely to affect the outcome of numerous cases concerning renewals under section 304(a), as well as the increasingly common cases concerning termination rights under section 304(c).[10] The court sums up its conclusion by saying that Richlin's heirs have no renewal rights because "Richlin failed to secure federal statutory copyright protection for the Treatment." App. at 32a. Earlier the court suggests that "the author of a work at common law must [himself] secure a federal copyright for that work for the right to renew to vest in either him or his heirs." App. at 30a. These conclusions are clearly incorrect and reflect an ignorance of the history of the renewal term statute.

The court apparently did not realize that it has long ago become common practice for an author to assign unpublished works to a publisher prior to securing copyright protection. For example, in *Marascalco*, the authors of the unpublished song assigned their rights to a publisher, who copyrighted the song the following year. *Marascalco*, 953 F.2d at 469. Assignment by the author prior to publication securing copyright is

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10. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 105 S.C Ct. 638, 83 L. Ed. 2d 556 (1985); *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008).

considered the "usual practice." *Marascalco*, 953 F.2d at 475. Indeed, the 1909 Act purposely changed the prior practice that had required prior registration of an author's work. As the Ninth Circuit explained in *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988), "Once the 1909 Act was adopted, it was common for an 'author [to] assume[] the publisher would attend to copyrighting the work in his behalf.'" *Id.* at 1470 (quoting *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 402 (2d Cir. 1970)). To the extent the Ninth Circuit suggests that an author must himself secure statutory copyright prior to assignment to a publisher, the court is in direct conflict with *Marascalco* and countless other cases in which renewal rights were affirmed even though the author had assigned an unpublished and uncopyrighted work.[11]

But if the author needs not himself first secure statutory copyright prior to assignment, then what is in fact required? After assignment, the author no longer *owns* the work and cannot control how it is published. The Ninth Circuit apparently suggests, contrary to the express language of section 304(a), that the work must be published "as such" — i.e. "as a work standing alone" (App. at 25a) — in order for the author and his heirs to have renewal rights in the work. But should it even matter to the author whether or not the work is published "alone" by the publisher, or perhaps edited or adapted first and then published as part of a larger project, or in a musical or a film? What about a publisher

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11. *See also Edward*, 140 F.2d 266 (song renewed by lyricist who had assigned unpublished lyrics to publisher); *Shapiro*, 161 F.2d 406 (renewal protected song and new lyrics that had been assigned to publisher).

that adds lyrics to music to make a song? What possible difference could it make to the author, who has already assigned away his ownership interest in the work? And what of the public policy behind the renewal statute, in securing for an author's heirs a new property right if the author does not survive long enough to reap the benefits of the success of his work?

The Ninth Circuit's incoherent argument completely breaks down when it tries to distinguish between the Treatment itself and the "elements of the Treatment that were incorporated into the Motion Picture," which the court claims were "statutorily protected as components of the Motion Picture, not as an independent 'work.'" Just that distinction was rejected earlier by the Ninth Circuit in *Batjac*. In *Batjac*, the plaintiff argued that the film was a derivative work based on the underlying, unpublished screenplay. When the derivative work (the film) fell into the public domain after a failure to renew, the plaintiff argued that it could still protect the underlying work (the screenplay), which it argued was unpublished ("as such") and therefore never the subject of a pre-1978 statutory copyright. Not so, said the Ninth Circuit. The screenplay was in fact first published in the form of a film and protected by copyright; therefore the film's screenplay too fell into the public domain.

> *Under common law, Batjac had a right of first publication which it exercised by publishing the motion picture. Unlike a performance, the motion picture was recorded onto a fixed medium, film, that is reproducible and distributable. Batjac's*

common law right of first publication does not entail multiple first publication rights in every available medium. As holder of the common law rights in the screenplay and motion picture, Batjac chose to exercise its right to first publish in the medium of film. Batjac had the opportunity to secure copyright in the screenplay separate from the movie but chose not to do so. It cannot now attempt to regain its first publication rights 35 years after it produced the screenplay within the motion picture.

Our holding is supported by the protections provided to copyrightable material used in a motion picture under the 1909 Act. Section 3 of the 1909 Act protects all copyrightable component parts of a copyrighted work. 17 U.S.C. § 3 (repealed effective 1978). The McLintock! screenplay was copyrightable and is a component of the motion picture to the extent it was incorporated into the film. As such, it fell into the public domain with the motion picture. The Register points to Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 885 n.3 (9th Cir. 1996), to illustrate that the screenplays would either be components of the movie or otherwise part of the public domain. While Batjac disputes that a screenplay is a component part of a motion picture, any other result under the 1909 Act would grant an author multiple rights to first publication and would allow an author to publish in one

> *medium with a statutory copyright but leave the work unpublished in a separate medium to extend copyright protection in perpetuity. See Classic Film Museum, Inc. v. Warner Bros., Inc., 597 F.2d 13, 14-15 (1st Cir. 1979).*
>
> *We find no statute or case law holding that a textual work can only be published by print.* ***Rather, the Supreme Court has stated that "the right of first publication encompasses not only the choice whether to publish at all, but also the choices when, where, and in what form first to publish a work."*** *Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985).*

Batjac, 160 F.3d at 1235 (emphasis added).

The quote from *Harper* above is important. The right of first publication also includes in what form to first publish a work. *Batjac's* screenplay was published in the form of a film. And in what form was Richlin's Treatment, his story and characters, first published? As the film *The Pink Panther*. *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 528 (9th Cir. 2008) (a literary work may also be published as an audiovisual work). When the Treatment was published in the form of that film, copyright in the "work," i.e. the story and characters created by Richlin, was secured. Copyright Act of 1909, §§3, 10 (copyright is secured by publication with notice).[12] The Ninth Circuit's

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12. Note that since 1909 registration has not been a requirement for securing federal copyright protection. Rather, under the 1909 Act, publication with proper notice (or registration) secured the copyright.

argument simply fails. The fact is that Richlin's Treatment was adapted, as specifically anticipated in the Assignment (App. at 5a, 77a, and 83a), and published in the medium of a film. At that point, the work (story and characters) contributed by Richlin became a "copyrighted work," subject to renewal under section 304(a). Because Richlin did not survive for 28 years after the first publication of his work, his heirs were entitled to the renewal term that vested[13] in them by operation of law.

The Ninth Circuit's ruling, distinguishing between the authors of published and unpublished works assigned to motion picture producers, creates an untenable conflict with *Stewart* and *Batjac* and is at odds with the express purposes of the Copyright Act. Review is necessary to correct this error, as the Court did in *Stewart* when it overruled *Rohauer*. The matter is as important now as it was then, because it concerns not only renewal rights under section 304(a), but also termination rights section 304(c) that Congress has granted to every author of a work created before 1978.

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13. The Ninth Circuit repeatedly uses the incorrect terminology "reverted to" instead of "vested in."

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this important matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 19, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-55307

BRADLEY RICHLIN; LANCE RICHLIN; MARK MANNIS; ABIGAIL RICHLIN SCHWARTZ,

Plaintiffs-Appellants,

LOUISE RICHLIN; ELYSSA PARTON; MICHELLE FORKEL, Nominal Defendants and Involuntary Plaintiffs-Appellants,

v.

METRO-GOLDWYN-MAYER PICTURES, INC.; GEOFFREY PRODUCTIONS, INC.,

Defendants-Appellees.

October 15, 2007, Argued and Submitted, Pasadena, California

June 19, 2008, Filed

JUDGES: Before: FERDINAND F. FERNANDEZ and KIM McLANE WARDLAW, Circuit Judges, and RANER C. COLLINS,* District Judge.

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

Appendix A

OPINION BY: Wardlaw

OPINION

Opinion by Judge Wardlaw:

Inspector Jacques Clouseau, famously unable to crack the simplest of murder cases, would most certainly be confounded by the case we face. While Inspector Clouseau searched for the answer to the question, "Who did it?", we must search for the answer to the question, "Who owns it?" In 1962, Maurice Richlin coauthored a story treatment (the "Treatment")[1] involving the bumbling inspector. Later that year, before publication,[2]

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1. According to expert witness Dr. Drew Casper of the University of Southern California's School of Cinema-TV, a treatment is a "brief outline, in prose, describing the actions of a movie plot, indicating characters along the way with little or no dialogue; it will run no more than 25 pages, it is the last stage before beginning a screenplay proper and as such, functions as a source for a script." The Treatment is a fourteen-page mixture of story and staging. For example, the Treatment reads: "Festival that night. Table with Princess, George, Sir Charles, Simone and the Inspector. Checking on car-facts about Le Pouf-Princess sees Secretary and excuses herself. Simone and George dance. George suggests a later rendezvous. He will find a way to get rid of her husband."

2. "Publication" is a term of art in the law of copyright. Publication before the effective date of the current Copyright Act divested an author of his common law copyright rights and injected the work into the public domain free for anyone to use.

(Cont'd)

Richlin assigned all rights in the Treatment—including copyright and the right to renew that copyright—to a corporation that used it to create the smash-hit film, *The Pink Panther* (the "Motion Picture"). The Richlin heirs now claim federal statutory renewal rights in the Treatment and derivative works, including the Motion Picture. They assert that Richlin's coauthorship of the Treatment makes him a coauthor of the Motion Picture. Alternatively, they contend that, because the Motion Picture secured statutory protection for the portions of the Treatment incorporated into the Motion Picture, and because the copyright in the Motion Picture was renewed for a second term, they are co-owners of the Motion Picture's renewal copyright and all derivative works thereof. Although the Richlin heirs have developed several theories that could supply the answer to the question, "Who owns it?", unlike Inspector

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(Cont'd)

Publication in accordance with the statutory formalities of the 1909 Act, 17 U.S.C. § 10 (1909), however, both divested the owner of his common law copyright and invested him with federal statutory copyright protection. The rationale for this doctrine is rooted in the United States Constitution, which provides that "[t]he Congress shall have power . . . . [t]o promote the progress of science and useful arts, by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. In exchange for securing the exclusive right to exploit his work that federal copyright accords, the author agrees that he will enjoy this monopoly for the limited duration Congress granted in the Copyright Acts, so that the public is the ultimate beneficiary. *See generally* 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §§ 4.01, 4.03 (2007).

Clouseau, they have not quite stumbled upon a theory that favors them. We therefore affirm the district court's conclusion that the Richlin heirs have no interest in the copyright to the Motion Picture.

I. BACKGROUND

The material facts are largely undisputed. In April 1962, Maurice Richlin and Blake Edwards coauthored a fourteen-page Treatment initially entitled *The Pink Rajah*, but later renamed *The Pink Panther*. The Treatment served as the basis for the well-known motion picture, *The Pink Panther*, and numerous derivative works. It appears that the Treatment set forth many of the plot elements and characters, including Inspector Clouseau himself, developed into the screenplay and incorporated into the Motion Picture.

Richlin and Edwards entered into an employment agreement dated May 14, 1962 (the "Employment Agreement") with the Mirisch Corporation of Delaware ("Mirisch") to write the screenplay for the Motion Picture.[3] They agreed to create the screenplay as a "work made for hire." Under this contract, Richlin and Edwards combined received $150,000 for their work on the Treatment and the screenplay.[4]

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3. The Richlin heirs contend that the Employment Agreement was executed on June 12, 1962. The precise date of the contract's execution does not affect our holding.

4. A letter dated June 28, 1962, confirmed that "the $150,000 payment for property [the Treatment] and screenplay is divided $50,000 for property and $100,000 for screenplay."

Later that month, on May 24, 1962, Richlin and Edwards executed a literary assignment agreement (the "Assignment") whereby they transferred and assigned "forever . . . that certain story (which term shall cover all literary material written by [Richlin and Edwards] in connection therewith including any adaptations, treatments, scenarios, dialogue, scripts and/or screenplays) entitled: 'Pink Rajah' also entitled or known as 'Pink Panther' " in exchange for $1 "and other good and valuable consideration in hand" paid by Mirisch. Mirisch also received "the right to use [Richlin's and Edwards's] name[s] as the author of the literary composition upon which said adaptations, or any of them, are based." The Assignment further provided that if Mirisch copyrighted the Treatment, Mirisch "shall enjoy its rights hereunder for the full duration of such copyright or copyrights, including any and all renewals thereof."[5]

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5. Although Richlin assigned to Mirisch all rights in the unpublished Treatment, an assignment of a statutory renewal copyright, assuming the Treatment became the subject of statutory copyright, would not become effective unless the author/assignor lives to the commencement of the renewal term, which is when the renewal interest vests in the author. *See Stewart v. Abend*, 495 U.S. 207, 220, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) ("[I]f the author dies before the commencement of the renewal period, the assignee holds nothing." (citing *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377, 80 S.Ct. 792, 4 L.Ed.2d 804 (1960) ("Section 24 [of the 1909 Act] reflects, it seems to us, a consistent policy to treat renewal rights as expectancies until the renewal period arrives.")")). The Richlin heirs' claim is based on Richlin's predeceasing the vesting of the renewal interest provided by statutory copyright.

Appendix A

In 1963, *The Pink Panther* was released and distributed in theaters to great acclaim. It was followed by nine movie sequels,[6] many of which gave screen credit to Richlin and Edwards for creating the characters. The original Motion Picture bears a copyright notice of 1963 in the name of Mirisch and G & E Productions. In 1964, the U.S. Copyright Office issued a certificate of registration for the "motion picture" entitled "The Pink Panther" under the Copyright Act of 1909 ("1909 Act").

The Certificate of Registration identifies the claimant and author as "Mirisch-G & E Productions." The certificate lists the date of publication as March 18, 1964, but notes that the copyright notice on the Motion Picture bears a date of 1963. The Richlin heirs concede that neither the Treatment nor the screenplay was ever separately published or registered for federal copyright protection.

Richlin died on November 13, 1990. The original term of copyright in the Motion Picture—twenty-eight years from the first date of publication—was set to expire in 1991,[7] but it was renewed that year by the successors-

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6. *A Shot in the Dark* (1964); *Inspector Clouseau* (1968); *The Return of the Pink Panther* (1975); *The Pink Panther Strikes Again* (1976); *Revenge of the Pink Panther* (1978); *Trail of the Pink Panther* (1982); *Curse of the Pink Panther* (1983); *Son of the Pink Panther* (1993); and *The Pink Panther* (2006).

7. Under the 1909 Act, as amended, federal copyright protection was secured "by publication thereof with the notice (Cont'd)

in-interest to Mirisch-G & E Productions, MGM-Pathe Communications Co./ Geoffrey Productions Inc. (collectively, "MGM"). A Renewal Certificate issued, which identified MGM as the claimant and "proprietor of copyright in a work made for hire" and the author and original claimant as Mirisch-G & E Productions. None of the Richlin heirs attempted to secure a renewal interest in the Treatment or screenplay, and there is no separate renewal certificate for either.

The Richlin heirs filed suit in the United States District Court for the Central District of California seeking declaratory relief and an accounting. They claim a 50 percent renewal interest in the Treatment and all derivative works. During the course of this litigation, the theories undergirding this claim have evolved. The complaint relies on the theory that publication of the derivative work (the Motion Picture) effectuated publication of the underlying work (the Treatment). Under this theory, when MGM renewed the Motion Picture's statutory copyright in 1991, this renewed the copyright in the Treatment on behalf of the Richlin heirs,

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(Cont'd)

of copyright required by [§ 19] of this title." 17 U.S.C. § 10 (1909). There is no dispute that the Motion Picture was released and distributed with proper notice in 1963, although it was not registered with the U.S. Copyright Office until 1964. Because "the copyright secured by [the 1909 Act] . . . endure[d] for twenty-eight years from the date of first publication," 1991 was the year the original term would expire. *See id.* § 24. The Renewal Registration identifies its effective date as February 13, 1991.

which gave the Richlin heirs an interest in the Motion Picture's renewal copyright. These principles carry some theoretical weight in copyright law; however, the Richlin heirs failed to renew their statutory copyright, if any, in the Treatment in 1991. That may explain why, by the time the district court granted summary judgment in favor of MGM, the Richlin heirs had abandoned their argument based on a statutory copyright in the Treatment. Instead, they argued that they have a copyright interest in the Motion Picture as coauthors based on Richlin's coauthorship of the Treatment, which was incorporated into the Motion Picture. The district court analyzed the requirements of a "joint work" prepared by coauthors, who under copyright law would each be deemed an owner of the copyright. The court rejected this theory because, under the factors set forth in *Aalmuhammed v. Lee,* 202 F.3d 1227, 1234 (9th Cir.2000), Richlin had no control over the Motion Picture, and there was no manifestation of intent—by contract or otherwise—that Richlin and Edwards would be coauthors of the Motion Picture. *See id.* at 1234 (analyzing coauthorship under three factors: control, objective manifestation of intent to be coauthors, and whether the audience appeal of the work can be attributed to all coauthors). Because the coauthorship theory failed, the district court awarded summary judgment in favor of MGM, declining to reach any other issues. The Richlin heirs timely appeal.

Appendix A

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1338, which confers subject matter jurisdiction over copyright actions. We have jurisdiction over final judgments of the district courts pursuant to 28 U.S.C. § 1291.

We review a district court's grant of summary judgment de novo. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). In reviewing the grant of summary judgment, we "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.*

III. DISCUSSION

On appeal, the Richlin heirs maintain their contention that because Richlin and Edwards jointly authored the Treatment, and the Treatment became a critical component of the Motion Picture, Richlin was a coauthor of the Motion Picture, and was therefore a co-owner on whose heirs' behalf MGM secured a renewal interest in the Motion Picture's copyright in 1991. Alternatively, the Richlin heirs resort to the theory underlying their complaint. They contend that publication of the Treatment with the Motion Picture secured a statutory copyright for the Treatment, which was renewed on their behalf by MGM when it renewed the Motion Picture's copyright. We address each argument in turn.

Appendix A

A. Coauthorship of the Motion Picture

To determine whether Richlin had an interest in the Motion Picture's federal statutory copyright, we must consider the question of coauthorship. The Richlin heirs argue that because Richlin coauthored the Treatment, which was a substantial component of the Motion Picture, he is also a coauthor of the Motion Picture. This coauthorship, according to the Richlin heirs, gives them an interest in the Motion Picture's copyright. Under this facially appealing, but legally unsustainable, argument, an interest in the renewal term of copyright and all subsequent motion pictures and adaptations based on that copyright would revert to the Richlin heirs.[8] *See* 17 U.S.C. § 201(a) (1976) ("The authors of a joint work are co-owners of copyright in the work.").

We agree with the district court that Richlin and Edwards were not coauthors of the Motion Picture. Richlin and Edwards wrote the Treatment in 1962, and the Motion Picture was copyrighted when published with notice in 1963; therefore, the Richlin heirs' claim of coauthorship is governed by the 1909 Act.

The 1909 Act, however, did not expressly mention or define joint works or coauthorship. Nevertheless, as early as 1915, in *Maurel v. Smith*, Judge Learned Hand

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8. The Richlin heirs' claim to the renewal copyright in the Motion Picture rests on the rule that an assignment of renewal rights by the author of a copyrighted work does not become effective unless the renewal interest vests in the then-living author. *See Abend*, 495 U.S. at 220, 110 S.Ct. 1750.

applied the universally adopted common law definition of joint authors to the 1909 Act, holding that they "undertake jointly to write a play, agreeing on the general outline and design and sharing the labor of working it out." 220 F. 195, 199 (S.D.N.Y.1915) (quoting *Levy v. Rutley,* L.R. 6 C.P. 523 (1871)); *see also Edward B. Marks Music Corp. v. Jerry Vogel Music Co.,* 140 F.2d 266, 267 (2d Cir.1944) ("[I]t is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."); LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 190 n. 15 (2007) ("In *Levy v. Rutley,* the earliest recorded case on joint authorship, Byles[,] J[.] found joint authorship to exist although one person had contributed a very small amount of work to the execution."). Then, in *Picture Music, Inc. v. Bourne, Inc.,* a district court suggested a "statutory revision[ ] of the copyright law [that] would define a 'joint work' as one 'prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' " 314 F.Supp. 640, 646 (S.D.N.Y.1970). This was the precise wording that Congress used to define "joint work" when it enacted the 1976 Act. *See* 17 U.S.C. § 101 (1976). As Professor Nimmer explains, "[t]he 1909 Act did not expressly refer to the doctrine of joint ownership, but its principles, largely unchanged under the current Act, were firmly established by case law, and were applicable to common law as well as statutory copyright." 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 6.01 n. 1 (2007). Because the 1976 Act incorporated the well-

established case law interpreting the definition of "joint work" under the 1909 Act, we may assess the Richlin heirs' claim under the more fully developed rubric of the 1976 Act.

Section 101 of the 1976 Act defines "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1976). A "joint work" requires each author to make "an independently copyrightable contribution." *Ashton-Tate Corp. v. Ross,* 916 F.2d 516, 521 (9th Cir.1990). "The authors of a joint work are co-owners of copyright in the work." 17 U.S.C. § 201(a) (1976). Even if a person's contribution is minor, once he is accorded joint authorship status, he enjoys all benefits of joint authorship. *See Erickson v. Trinity Theatre, Inc.,* 13 F.3d 1061, 1068 (7th Cir.1994); *Cmty. for Creative Non-Violence v. Reid,* 846 F.2d 1485, 1498 (D.C.Cir.1988), *aff'd on other grounds,* 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989); *Bencich v. Hoffman,* 84 F.Supp.2d 1053, 1055 (D.Ariz.2000); 1 NIMMER § 6.08.

In *Aalmuhammed v. Lee,* 202 F.3d 1227, 1234 (9th Cir.2000), we set forth three criteria for determining whether a work is jointly authored under § 101. First, we determine whether the "putative coauthors ma[de] objective manifestations of a shared intent to be coauthors." *Id.* A contract evidencing intent to be or not to be coauthors is dispositive. *Id.* Second, we determine whether the alleged author superintended the work by exercising control. *Id.* Control will often be

the most important factor. *Id.* Third, we analyze whether "the audience appeal of the work" can be attributed to both authors, and whether "the share of each in its success cannot be appraised." *Id.* (quotations omitted).

The plain language of § 101 makes clear that Richlin is a coauthor of the Treatment. Viewing the facts in the light most favorable to the Richlin heirs, Richlin and Edwards could have secured statutory copyright for the Treatment before assigning it to Mirisch, as it was a fourteen-page original creative story written jointly by Richlin and Edwards. *See* 17 U.S.C. § 4 (1909) ("The works for which copyright may be secured under this title shall include all the writings of an author."); 17 U.S.C. § 102 (1976) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ."); 1 NIMMER §§ 2.04 and 6.01 (articulating standards for "literary works" and "joint works"). Moreover, the Treatment "was prepared by two or more authors," Richlin and Edwards, who clearly intended that it be "merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1976). Indeed, this is what Richlin and Edwards accomplished when they presented the completed Treatment to Mirisch.

But the Treatment is not the appropriate reference point. The Richlin heirs' claim for declaratory relief and an accounting rests on their argument that, by virtue of his contribution to the Treatment, Richlin is coauthor of the Motion Picture. Thus, the work that must be examined to determine joint authorship is the Motion

Picture, not the Treatment. The plain language of § 101 does not shed light on whether Richlin was a coauthor of the Motion Picture. Applying the *Aalmuhammed* factors to Richlin's involvement in the Motion Picture, however, confirms that Richlin and Edwards were not coauthors of that work.

We must first determine whether "putative coauthors ma[de] objective manifestations of a shared intent to be coauthors." *Aalmuhammed*, 202 F.3d at 1234. A contract evidencing intent to be or not to be coauthors is dispositive. *Id.* In the absence of a contract, we look to other objective evidence of intent. *Id.* The district court found that the Assignment was contractual evidence of an objective manifestation that the parties did *not* intend to be coauthors. The district court reasoned that the Assignment conveyed forever "that certain story . . . including any adaptations, treatments, scenarios, dialogue and/or screenplays." Professor Nimmer clarifies that "forever," when used in conjunction with conveyance of a *copyrighted* work (which the Treatment was not), "should be considered a shorthand for 'the original and renewal term of copyright, plus any extensions, reversions, resurrections, or other circumstances that prolong the term.' " 3 NIMMER § 10.14[N]. Although the Treatment was not the subject of a federal statutory copyright, we agree with the district court that when Richlin and Edwards conveyed all present and future interests in the Treatment and derivative works to Mirisch, the parties to the contract could not consistently entertain the intent that Richlin and

Edwards would be coauthors of the Motion Picture. Rather, Mirisch was given the right to exploit the Treatment in any way he chose. In any event, no language in the Assignment indicates any intent that Richlin and Edwards were to coauthor the Motion Picture.

In light of the Assignment, the Employment Agreement, and the surrounding circumstances, there were no "objective manifestations of a shared intent to be coauthors." *Aalmuhammed*, 202 F.3d at 1234. The Assignment conveyed to Mirisch all present and future rights in the Treatment and derivative works, including the common law "copyright." Neither the Assignment nor the Employment Agreement said anything about Richlin becoming a coauthor of the Motion Picture. None of *The Pink Panther* sequels lists Richlin as coauthor; rather, they simply give him screen credit as the creator of the original story and characters. Both the initial- and renewal-term statutory copyright registrations list Mirisch and its successors-in-interest as authors of the Motion Picture, not Richlin. Furthermore, the Employment Agreement specified that Richlin and Edwards were Mirisch's "employees," rendering the screenplay a "work made for hire," which is also inconsistent with the view that Richlin coauthored the Motion Picture.[9] *See* 17 U.S.C. § 26 (1909); *Warren*

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9. On November 25, 1992, MGM sent a check for $8,563.62 and a letter to Richlin's widow, Louise Richlin, stating "[t]his check constitutes payment in full for any rights used in or relating to[*Son of Pink Panther*] that are owned or controlled

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v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir.2003) ("[I]f the work is made for hire, 'the employer or other person for whom the work was prepared is considered the author . . . , and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights in the copyright.' " (quoting 17 U.S.C. § 201(b) (1976))).

The second factor-whether Richlin supervised the Motion Picture by exercising control-favors MGM as well. Richlin did not exercise any supervisory powers over the Motion Picture, a factor that *Aalmuhammed* indicates will often be the most important. *Aalmuhammed*, 202 F.3d at 1234. The Assignment granted to Mirisch "forever . . . the absolute and unqualified right to use the [Treatment], in whole or in part, in whatever manner said purchaser may desire." Thus, while Richlin may have had control over the Treatment as originally written, he had no control over how the Treatment was incorporated into the Motion

(Cont'd)

by Maurice Richlin or by you pursuant to the Writers Guild of America agreement or otherwise."Upon first inspection, this would appear to be a clue as to which parties or persons own the renewal interest in the Motion Picture. However, such monies paid are but one more lead into a dead end. In February 1965, Richlin, Edwards, and the Writers Guild of America entered into a settlement agreement with Mirisch resolving a dispute regarding *A Shot in the Dark* and the applicability of sequel payments. The check paid to Louise Richlin in 1992 was issued pursuant to this settlement agreement, which is a contractual matter unrelated to the question of ownership of the renewal copyright interest in the Motion Picture.

Picture. Moreover, although Richlin and Edwards cowrote the screenplay, the screenplay was a work made for hire pursuant to the Employment Agreement, making Mirisch the author/owner of the screenplay. 17 U.S.C. § 26 (1909); *Warren*, 328 F.3d at 1140. Any control that Richlin may have had over the screenplay does not lend support to his claim that he exercised any control over the creation of the Motion Picture.

We agree with the district court that the third factor, whether "the audience appeal of the work" can be attributed to both authors, and whether "the share of each in its success cannot be appraised," favors the Richlin heirs, in light of the summary judgment standard. *Aalmuhammed*, 202 F.3d at 1234. As the district court noted, it is nearly impossible to determine how much of the Motion Picture's audience appeal and success can be attributed to the Treatment. Although the characters that Richlin helped to create formed the basis for the Motion Picture's success, perhaps it was Peter Sellers's legendary comedic performance, Henry Mancini's memorable score, or Blake Edwards's award-winning direction[10]—none of which can be attributed to Richlin—that was the main draw. Nevertheless, given that the Motion Picture adopted the characters and original story from the Treatment, and that, absent the Treatment, the Motion Picture likely would not exist,

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10. Edwards was nominated for an Academy Award in 1982 for writing *Victor/Victoria*, and received an honorary Academy Award in 2003 "in recognition of his writing, directing and producing an extraordinary body of work for the screen," such as *The Pink Panther* series and *Breakfast at Tiffany's*.

we cannot say the district court erred in finding that this factor favors the Richlin heirs.

Given that the two primary *Aalmuhammed* factors weigh most heavily in favor of Appellees, we hold that Richlin was not a coauthor of the Motion Picture. Therefore, there is no renewal interest in the Motion Picture that might conceivably have vested in the Richlin heirs under a theory of coauthorship.

B. Significance of "Publication" of the Treatment

At the time the Treatment was incorporated into the Motion Picture,[11] the Treatment was neither published nor the subject of federal statutory copyright. From this predicate, the Richlin heirs weave together a string of copyright truisms culled principally from *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir.1998), *Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990),

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11. All parties agree, at least for purposes of summary judgment and appeal, that the Treatment was incorporated into the Motion Picture. Those copyrightable elements of the Treatment that were not incorporated into the Motion Picture retained their common law copyright protection because they were not published, and received statutory copyright protection with the enactment of the 1976 Act. *See* 17 U.S.C. § 303(a) (1976); 3 NIMMER § 9.09[A]. The questions of whether any such copyrightable elements that were not incorporated into the Motion Picture exist, and if so, what they might be and whether they constitute a copyrightable "work," are not before us on this appeal.

and *Selznick v. Turner Entertainment Co.*, 990 F.Supp. 1180, 1185 (C.D.Cal.1997), to theorize that the Treatment achieved statutory copyright protection when the Motion Picture was published with notice in 1963. They further argue that because Richlin predeceased the vesting of the statutory renewal rights in the Treatment, those renewal rights reverted to the Richlin heirs. When MGM renewed the statutory copyright in the Motion Picture, this renewed the Treatment's statutory copyright on behalf of the Richlin heirs.[12] And, because the Motion Picture incorporated the Treatment, the Richlin heirs are now co-owners of the Motion Picture's copyright.

Our analysis begins with an assessment of exactly what rights Richlin did and did not own when he assigned all rights in the Treatment to Mirisch on May 24, 1962. The original copyright in the Motion Picture is governed by the 1909 Act because the Treatment and the Motion Picture were created before January 1, 1978, when the Copyright Act of 1976 ("1976 Act") became effective. 17 U.S.C. § 304 (1976). The copyright was renewed in 1991, after the effective date of the 1976 Act. Thus, to analyze questions arising from events that occurred before January 1, 1978, such as who is the author of the Treatment, the 1909 Act applies; for events that occurred after that date, such as registration of the renewal copyright, the 1976 Act

12. According to the Richlin heirs, because Edwards lived to the renewal term, MGM retained the right to renew the supposed statutory copyright in the Treatment, even though Richlin's interest in the Treatment had reverted to his heirs.

applies. *See* 1 NIMMER OV-7 ("In determining the corpus of law that governs a particular situation, the guiding principle should be to apply the law in effect when the infringement (or other activity), upon which suit is based, arises.").

Unlike the 1976 Act, the 1909 Act recognized a distinction between state (or common law) and federal copyright protection. *Batjac,* 160 F.3d at 1226. Unpublished works were protected by state common law or statute, while works published in accordance with the statutory formalities received federal statutory protection. *Id.* State common law protection—which afforded only rights of first publication and transferability of ownership-commenced when the work was created and ended when the work was published. *See* 1 NIMMER § 2.02. Once published, the work would obtain federal statutory protection, as long as it was published with proper notice. 17 U.S.C. §§ 10, 19 (1909). The duration of statutory copyright was twenty-eight years, with the option to renew for another twenty-eight years. *Id.* § 24.

Because the Treatment was not published at the time of the Assignment, Richlin's and Edwards's property interest in it is governed by California law at the time of transfer. *Wheaton v. Peters,* 33 U.S. 591, 658, 8 Pet. 591, 8 L.Ed. 1055 (1834) ("When . . . a common law right is asserted, we must look to the state in which the controversy originated."). In California, "the basic principles governing 'common law' copyright have been codified in Civil Code section 980 et seq." *Zachary v. W.*

Publ'g Co., 75 Cal.App.3d 911, 918, 143 Cal.Rptr. 34 (1977). When Richlin and Edwards submitted the Treatment to Mirisch, it was the subject of California state law (otherwise known as "common law") copyright protection. As coauthors, in the absence of a contrary agreement, they were joint owners of the Treatment. CAL. CIV. CODE § 981(a) (1949). Pursuant to former California Civil Code § 980 *et seq.*, they had the right "to *exclusively* possess it, use it, and transfer or otherwise dispose of it." 13 WITKIN SUMMARY OF CAL. LAW (10th ed. 2005) Personal Property, § 46; *see also Carpenter Found. v. Oakes*, 26 Cal.App.3d 784, 793, 103 Cal.Rptr. 368 (1972).

California common law copyright provided for two key mechanisms to divest the copyright owner of his copyright-publication and transfer. Once the copyright owner published his work, it lost all common law copyright protection.[13] *See Carpenter*, 26 Cal.App.3d at 793, 103 Cal.Rptr. 368 ("[I]f the owner publishes the composition, it may be used by any person. . . ."); CAL. CIV. CODE § 983(a) (1949). The copyright owner could also transfer his right of first publication before the work was published. CAL. CIV. CODE § 982 (1949); *Loew's Inc. v. Superior Court*, 18 Cal.2d 419, 421, 115 P.2d 983 (1941). Once the common law copyright is transferred, however, "the transferee becomes the lawful owner, unhindered by the fact that he is not the author." *Carpenter*, 26 Cal.App.3d at 794-95, 103 Cal.Rptr. 368.

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13. If the owner of a common law copyright published the work without complying with federal statutory requirements, it would enter the public domain. *Abend*, 495 U.S. at 233, 110 S.Ct. 1750.

Appendix A

It is undisputed that the Treatment was unpublished and not the subject of federal statutory copyright protection when Richlin and Edwards transferred it to Mirisch. The transfer of that state common law right neither invested the Treatment with statutory copyright protection nor divested the work of its common law copyright protection. The significance of the transfer, however, is that Mirisch became the owner of the common law copyright in the Treatment. *See id.* In 1963, Mirisch published the Motion Picture with notice, thus securing federal statutory protection for the Motion Picture.

Acknowledging that the Treatment was unpublished until its copyrightable elements were published by virtue of the release and distribution of the Motion Picture in 1963 as components thereof, the Richlin heirs argue, in misplaced reliance upon our decision in *Batjac,* that the 1991 renewal of the Motion Picture effected a renewal of the unpublished Treatment's—now statutory—copyright. In *Batjac,* James Edward Grant wrote an original screenplay entitled "McLintock!" and almost immediately assigned all rights in the unpublished screenplay to Batjac, who incorporated the screenplay into the motion picture by the same name. *Batjac,* 160 F.3d at 1225. The motion picture was released to the general public and received federal statutory copyright protection in 1963. *Id.* Batjac failed to renew the copyright in the motion picture, which fell into the public domain in 1991. *Id.* After GoodTimes Home Video Corp. ("GoodTimes") began producing and selling videocassettes of the motion picture, Batjac

sought copyright registration for two intermediate drafts of the screenplay, and then brought suit against GoodTimes for copyright infringement. *Id.* Batjac's suit was brought to a halt when the Copyright Office rejected Batjac's application to copyright the portions of the screenplay that were incorporated into the motion picture, on the ground that the motion picture—and all of its component parts—had fallen into the public domain. *Id.* On Batjac's challenge to this ruling, we deferred to the Copyright Office's interpretation of the 1909 Act and held that the "screenplay was copyrightable and is a component of the motion picture to the extent it was incorporated into the film. As such, it fell into the public domain with the motion picture." *Id.* at 1235 (citing 17 U.S.C. § 3 (1909) ("The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted . . . .")); *see also id.* at 1233 ("[A]n unpublished screenplay protected by common law is published by a motion picture to the extent that it is incorporated."); *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 591, 592 (2d Cir.1999) ("We conclude . . . that if a previously unpublished screenplay is embodied in a motion picture, so much of the screenplay as is disclosed in the motion picture is published when the motion picture is published."); *Classic Film Museum, Inc. v. Warner Bros., Inc.*, 597 F.2d 13, 14-15 (1st Cir.1979) (holding that when the statutory copyright to a motion picture fell into the public domain, so too did any common law copyright in the motion picture's component parts, such as the screenplay); 1 NIMMER § 4.12[A] ("Because a derivative work by definition to some extent

incorporates a copy of the pre-existing work, publication of the former necessarily constitutes publication of the copied portion of the latter.").

Under *Batjac*, publication of the Motion Picture published those elements of the Treatment incorporated into the Motion Picture, *see* 17 U.S.C. § 3 (1909), and thus the Motion Picture's federal statutory copyright protection extended to those copyrightable elements of the Treatment that were published as components of the Motion Picture; however, this did not constitute publication of the Treatment "as such"—i.e., as a work standing alone. We have held that courts should generally defer to the Register of Copyright's ("Register") interpretation of the copyright statutes, as " '[t]he Register has the authority to interpret the copyright laws and . . . its interpretations are entitled to judicial deference if reasonable.' " *Batjac*, 160 F.3d at 1230 (quoting *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir.1991)). Accordingly, in *Batjac* we adopted the Register's view that publication of the screenplay, or here, the Treatment, did not publish the Treatment as an independent work, but just those portions incorporated into the published work. We deferred to the Register's reliance on the *Compendium of Copyright Office Practices*, which governed the Register's practices under the 1909 Act. The *Compendium* provides:

> Publication of a portion of a work does not necessarily mean that the work as a whole has been published.

Appendix A

> Examples:
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> (1) Publication of a detailed plot summary of a play does not constitute publication of the play as a whole.
>
> (2) Publication of a movie version of an unpublished story does not constitute publication of the story as such.

Batjac, 160 F.3d at 1230 (quoting Compendium I, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 3.1.1 IV(a)). The *Compendium* makes clear that, by virtue of the publication of the Motion Picture, the Treatment "as such" did not become the subject of statutory copyright. Rather, only those elements of the Treatment that were incorporated into the Motion Picture were published, and they were statutorily protected as components of the Motion Picture, not as an independent "work." Thus, we reject the Richlin heirs' contention that publication of the Motion Picture with notice invested the Treatment with a statutory copyright.[14]

The Richlin heirs contend that this reading of *Batjac* is inconsistent with the Supreme Court's decision in

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14. Although the copyright in the Motion Picture "protect[ed] all the copyrightable component parts of the work," 17 U.S.C. § 3 (1909), that is not the same as securing a copyright in those component parts. Richlin and Edwards would have had to publish the Treatment itself with notice to secure a copyright in that "work" under the 1909 Act.

Stewart v. Abend. There, Cornell Woolrich authored a short story entitled "It Had to Be Murder," which was published as a collective work with other short stories in Dime Detective Magazine ("Dime Detective") in 1942. *Abend,* 495 U.S. at 211, 110 S.Ct. 1750. Woolrich assigned to Dime Detective only his right to publication, retaining all other rights. *Id.* When the magazine was published, the magazine's blanket copyright notice secured federal statutory copyright for the separate and independent works it contained, including Woolrich's story. *Id.* In 1945, Woolrich assigned to a producer the federal statutory right to make a motion picture version of "It Had to Be Murder," and also agreed to renew the copyright in the story and to assign the same motion picture rights to the producer at the appropriate time. *Id.* at 212, 110 S.Ct. 1750. The producer subsequently assigned his rights to Jimmy Stewart and Alfred Hitchcock's production company, which developed "It Had to Be Murder" into the motion picture *Rear Window. Id.* Woolrich died before the renewal term commenced. *Id.* at 213, 110 S.Ct. 1750. The executor of Woolrich's estate then renewed the copyright in the story and assigned it to Abend, who, years later, sued Stewart, Hitchock, MCA Inc., and Universal Film Exchanges for infringement of the right to distribute *Rear Window* during the story's renewal term of copyright. *Id.* at 212-13, 110 S.Ct. 1750. The Supreme Court held that "if the author dies before the renewal period, then the assignee may continue to use the original work only if the author's successor transfers the renewal rights to the assignee." *Id.* at 221, 110 S.Ct. 1750; *see also id.* at 219, 110 S.Ct. 1750 ("[W]hen an

author dies before the renewal period arrives, his executor is entitled to the renewal rights, even though the author previously assigned his renewal rights to another party."); *id.* at 219-20, 110 S.Ct. 1750 ("The right of renewal is contingent. It does not vest until the end [of the original term.]" (quoting 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part K, p. 77 (E. Brylawski & A. Goldman eds.1976) (statement of Mr. Hale))). Therefore, because Woolrich was not alive at the commencement of the renewal term, the renewal term of copyright did not vest in him, and his prevesting transfer was null and void. Abend, the assignee of the executor of Woolrich's estate, was the rightful owner of the renewal term of copyright in the story "It Had to Be Murder." *Id.* at 235-36, 110 S.Ct. 1750.

Richlin died in 1990. Had the Treatment become the subject of statutory copyright as a separate and independent work, its renewal term would not commence until 1991. According to the Richlin heirs, because Richlin, like Woolrich, died before the right to renew the copyright vested, the right to renew the copyright in the Treatment reverted to them.[15] The disconnect in this theory is that, unlike the story "It Had to Be Murder," an independent work, the Treatment was never the subject of federal copyright protection as an independent work. Because it never was invested with statutory copyright protection, there

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15. Under this theory, during the supposed first term of copyright, the Richlin heirs would have had no interest because Richlin was free to assign, and did assign, all rights to Mirisch.

was no right to renew and, therefore, no renewal right to revert to the Richlin heirs.

Indeed, the Copyright Office has rejected the Richlin heirs' theory that previously unpublished components of a motion picture receive independent statutory copyright protection by virtue of incorporation into a motion picture that itself becomes the subject of federal statutory copyright protection. In *Husbands,* the Copyright Office Board of Appeals ("BOA") expressly ruled that an unpublished underlying work that is incorporated into a statutorily copyrighted motion picture does not receive a statutory copyright independent of the motion picture's copyright. *Husbands,* Copyright Office Board of Appeals Letter, Control No. 10-600-754-2(C), at 6 (May 14, 2002), *available at* http:// www. ipmall. info/ hosted_ resources/ Copyright Appeals. There, John Cassavetes authored a screenplay, but did not secure statutory copyright in the work. *Id.* at 1. He transferred "the rights" to Faces Music Inc., which incorporated the screenplay into the motion picture, *Husbands.* The motion picture received federal statutory copyright protection in 1970. *Id.* at 2. In 1998, when it came time to renew the motion picture's copyright for its second term, Cassavetes's heirs filed two renewal copyright registrations, one for the screenplay and one for the motion picture. *Id.* at 1. The Copyright Office issued the renewal registration in the motion picture, but denied the application for renewal of copyright in the screenplay. *Id.* The Cassavetes heirs appealed to the BOA, making the identical arguments as the Richlin heirs.

Appendix A

The BOA upheld the Copyright Office's rejection of the heirs' application for a renewal copyright interest in the screenplay, reasoning:

> The Copyright Office considered a motion picture to be a unified work of authorship for purposes of registration under the 1909 law. The Office's *Compendium I* (1973) described a motion picture as "ordinarily . . . embod[ying] a large number of contributions, including those of the author of the story, author of the screenplay, director, editor, cameraman, individual producer, etc. These persons are not regarded as the 'author' of the film in the copyright sense. *Compendium I* further states that most motion pictures were works made for hire, with the production company's [sic] being the employer in most cases. The Office's understanding of motion picture authorship . . . as consisting of contributions or parts, each of which is meant to be joined to other contributions or parts, in order to produce an integrated entity underlies this understanding.
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> . . . .
>
> The failure of the screenplay author . . . to have reserved via registration the copyright in the unpublished version of the screenplay . . . , thus rendering the screenplay's copyright for purposes of the

> public registration record separate and apart from the copyright in the motion picture, means that the Office, viewing the motion picture as an integrated entity, cannot now insert into the public record a claim to renewal rights owned by a party different from the owner of record of the rights in the integrated entity, i.e., in the motion picture as a whole.

Id. at 4, 6 (citations omitted).

Even absent the principle of deference to the views of the Copyright Office, we would find the BOA's analysis persuasive. A motion picture is a work to which many contribute; however, those contributions ultimately merge to create a unitary whole. As one district court explained, "it is impossible to cleave the story, screenplay and musical score of a motion picture film from the film itself." *Classic Film Museum, Inc. v. Warner Bros., Inc.*, 453 F.Supp. 852, 855-56 (D.Me.1978). Though publication of a motion picture with notice secures federal statutory copyright protection for all of its component parts, *see* 17 U.S.C. § 3 (1909), that does not mean that the component parts necessarily each secure an independent federal statutory copyright. The component parts may or may not be copyrightable; they may or may not be the subject of an independent statutory copyright when they are incorporated into the motion picture. As *Abend* itself demonstrates, the author of a work at common law must secure a federal copyright for that work for the right to renew to vest in either him or his heirs. The statutory copyright of a

motion picture precludes the public from copying or otherwise infringing upon the statutory rights in the motion picture, including its component parts. However, when Mirisch secured federal statutory copyright for the Motion Picture, it did not also secure a federal statutory copyright for the Treatment. Assuming the Treatment is a copyrightable work, Richlin and Edwards simply failed to secure federal copyright for it.

The Richlin heirs turn to *Selznick v. Turner Entertainment Co.* to argue that when the original term of copyright in the Motion Picture was renewed, the statutory copyright in the Treatment was also renewed. The entire reading audience by now will know how to resolve this contention: There was no statutory copyright in the Treatment to renew; therefore, renewal of the Motion Picture's copyright did nothing to affect the Treatment's copyright status. In *Selznick*, the plaintiff and defendants were undisputed co-owners of a federal statutory copyright in the classic motion picture *Gone With the Wind*. The defendants filed a renewal copyright registration in their names only, and claimed that this renewal eradicated the plaintiff's interest in the copyright. *Selznick*, 990 F.Supp. at 1186. The district court rejected this argument, ruling that "[i]t is well-established that the co-owner claiming the renewal takes legal title to the renewal copyright as constructive trustee on behalf of the non-renewing co-owner." *Id.* (citing *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir.1978)).

Therefore, the Richlin heirs' reliance on *Selznick* necessarily returns us to their flawed premise that Richlin coauthored the Motion Picture, and thereby became a co-owner of the Motion Picture's statutory copyright. Unlike in *Selznick,* however, Richlin was not a coauthor of the Motion Picture. Moreover, the Richlin heirs have wholly failed to demonstrate how the Motion Picture's incorporation of the Treatment invested in them an ownership interest in the Motion Picture's renewal copyright term. Although the Richlin heirs are correct that, under *Batjac,* publication of the Motion Picture also published those copyrightable elements of the Treatment incorporated into the Motion Picture, it is a nonsequitur to conclude that the Richlin heirs thereby gained a statutory copyright in the Treatment or the Motion Picture. As MGM points out, the only way on these facts for Richlin to be a co-owner of the copyright in the Motion Picture is if he had been a coauthor. Richlin, however, did not coauthor the Motion Picture. Therefore, *Selznick*'s holding that a joint owner who renews a copyright acts as a constructive trustee for the other joint owners is inapposite.

In the end, the Richlin heirs ask us to consider one question: "For what reason should Richlin's heirs be treated any differently than the heirs of any other author?" The answer is clear: Richlin failed to secure federal statutory copyright protection for the Treatment. Therefore, the Treatment as such was never invested with statutory copyright, and a right to renew the original term of statutory copyright neither vested in Richlin nor reverted to his heirs. Because Richlin

neither co-owned nor coauthored the Motion Picture, neither he nor his heirs have any interest in its copyright.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's decision.

AFFIRMED.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JANUARY 30, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 04-09162 DDP (AJWx)

[Motion filed on 11/04/05]

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS and ABIGAIL RICHLIN SCHWARTZ,

Plaintiff,

v.

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This matter is before the Court on the defendants' motion for summary judgment. After reading the papers submitted by the parties and hearing oral argument, the Court grants the defendants' motion.

Appendix B

I. BACKGROUND

The plaintiffs and the nominal defendants/ involuntary plaintiffs are the heirs of Maurice Richlin ("Richlin"). Richlin was a well-known screenwriter who co-wrote The *Pink Panther with* Blake Edwards. In 1962, Richlin allegedly approached Edwards with the plot for the film which became *The Pink Panther.* (Compl. 4.) Richlin and Edwards then started working on the written treatment for the picture ("the Treatment"). The Treatment allegedly set forth all the major characters which later became famous in *Thee Pink Panther*, including Inspector Clouseau (*Id.* at 4.)

In May 1962, Richlin and Edwards entered into an agreement with the Mirisch Corporation of Delaware ("Mirisch") to draft a screenplay based upon the Treatment. In May 1962, Richlin and Edwards also executed a literary assignment which assigned all copyright worldwide in any literary materials created by them including the Treatment. Metro-Goldwyn-Mayer Pictures Inc. ("MGM") and Geoffrey Productions, Inc. ("Geoffrey Productions") are the successors to Mirisch's assigned rights and the defendants in this action.

Maurice Richlin died on November 13, 1990. The plaintiffs claim that as a co-author of the Treatment, Richlin was a joint author of *The Pink Panther.* The plaintiffs claim that the right to renew his copyright (that he had previously assigned) upon his death vested in seven equal parts in his widow and six children — i.e.,

the plaintiffs and the nominal defendants/involuntary plaintiffs. The defendants renewed the copyright in *The Pink Panther* on February 13, 1991, and the plaintiffs claim that this act renewed the copyright on behalf of all potential renewal claimants. Therefore, the plaintiffs contend that they own a share of the copyright. The plaintiffs seek declaratory relief stating their rights in the copyright to the story and related property based on Richlin's status as a joint author. The plaintiffs claim that they have not received any money from the exploitation of the copyright during the renewal term of the copyright, and therefore request an accounting to profits from the story and all derivative works. The defendants disagree and now bring this motion for summary judgment.

II. DISCUSSION

A. *Legal Standard*

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986).

A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party does not bear the burden of proof at trial, he is entitled to summary judgment if he can demonstrate that "there is an absence of evidence to support the nonmoving party's case." *Id.* Once the moving party meets its burden, the burden shifts to the nonmoving party resisting the motion for summary judgment, who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

It is not enough for a party opposing summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* at 259. Instead, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 325. The nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id.* at 324. A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Thus, the "mere existence of a scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. There is no genuine issue of fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus.*

Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Disputed issues of fact are resolved against the moving party. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

B. *Analysis*

The defendants argue that the plaintiffs' claims fail as a matter of law for three reasons. First, the defendants assert that there is no separate statutory copyright in the Treatment. If the plaintiffs are not co-owners of a valid statutory copyright interest, there is no basis for their claims. Second, the defendants also assert that the plaintiffs' claims are time-barred pursuant to the Copyright Act's statute of limitations. Third, the defendants argue that the plaintiffs' claims are barred by the doctrine of laches. Finally, the defendants argue that even if the Court finds that the plaintiffs' claims are not barred for these reasons, the plaintiffs' claims for an accounting and other monetary relief arising from their alleged copyright interest in the Treatment must be limited solely to a percentage of the profits received by the defendants attributable to the use of any protectable expression from the Treatment in only the first film, *The Pink Panther*. (Mot. 3-4.)

1. *Copyright Interest*

The defendants argue that the plaintiffs' claims must fail because there is no copyright in the Treatment because the Treatment was not separately copyrighted prior to the motion picture. (Mot. 6.) The defendants own the copyright to *The Pink Panther* and assert that

the Treatment was an integrated component of the motion picture. The defendants argue that if there is no separate statutory renewal copyright in the Treatment that could have vested in the plaintiffs under section 304 of the Copyright Act, the plaintiffs do not hold any renewal term copyright interest and therefore they have no legal basis for their claims. (*Id.*)

The plaintiffs acknowledge that the Treatment copyright is incorporated into the motion picture's copyright and was renewed by MGM. Their argument is not based on a separate copyright in the Treatment. Instead, they argue that they have copyright rights in the entire motion picture as co-authors of the motion picture based on Richlin's co-authorship of the Treatment.

According to the Copyright Act, a "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. The authors of a joint work are co-owners of the copyright in that work. *Id.* § 201(a). Furthermore, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys all the benefits of joint authorship. *Bencich v. Hoffman*, 84 F.Supp.2d 1053, 1055 (D. Ariz. 2000). The language of section 101 establishes that a joint work must be (1) a copyrightable work, by (2) two or more "authors," and (3) the authors must intend the contributions to be "merged into inseparable or

interdependent parts of a unitary whole." *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 1999).

First, the Court examines whether the work contributed by the authors is copyrightable. The Ninth Circuit has held that the each author must make "an independently copyrightable contribution." *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990). Here, the plaintiffs' assertion of joint authorship stems from Richlin's co-authorship of the Treatment. Thus, the question is whether the Treatment is a copyrightable element. Although, the Treatment was not separately copyrighted and its copyright was instead incorporated into the motion picture, it could have been copyrighted by Richlin and Blake. The Treatment was a thirteen-page creative document in a fixed medium. The District of Arizona Court has acknowledged that movie treatments can be copyrighted. *Benich*, 84 F.Supp.2d at 1056. The defendants do not dispute that Richlin and Blake could have copyrighted the Treatment in 1962.

A key element of determining co-authorship of a joint work is the intent of the parties. The parties must have intended their work to be merged into an inseparable whole. Here the requisite intent appears to exist. Richlin and Blake intended that the Treatment develop into a movie. Mirisch intended to use the Treatment as the basis for the screenplay and subsequent movie. Everyone involved in the project worked toward the goal of creating a motion picture. The Second and Seventh Circuits have taken the intent

requirements even further to require not just intent to merge the works into a whole, but an intent to be co-authors of joint work. Following these courts, this must be the intent of all the putative co-authors, not just the person claiming co-authorship. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). The Ninth Circuit has not explicitly adopted the standards from the Second and Seventh Circuit but has instead laid out a multi-factored analysis that it believes reaches the same result. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233-34 (9th Cir. 1999)

The Ninth Circuit has noted that the best objective manifestation of shared intent to create a joint work is a contract. In the absence of a contract, the Ninth Circuit has identified three factors to consider when determining whether something is a joint work: (1) an author superintends the work by exercising control; (2) putative coauthors make objective manifestations of a shared intent to be coauthors; and (3) the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised. *Id.* at 1234. (explaining that "[c]ontrol in many cases will be the most important factor.")

Thus, the Court examines whether there was a contract between the parties designating intention to be co-authors. In May 1962, Richlin and Edwards executed a literary assignment (the "Assignment") which assigned to Mirisch all copyright worldwide in any

literary materials previously created by them related to *The Pink Panther*. In the Assignment, Edwards and Richlin transferred to Mirisch "that certain story (which term shall cover all literary material written by me in connection therewith including any adaptations, treatments, scenarios, dialogue and/or screenplays." (Literary Assignment, Grossman Decl. Ex A.) The plaintiffs acknowledge that via the Agreement, Richlin assigned his rights in the Treatment to Mirisch. (Opp'n 5.)

The Assignment instructed that these rights go to the purchaser "forever." Nimmer's copyright treatise explains

> Drafters often convey rights in a copyrighted work "forever" or in equivalent terms. In those instances, the intent behind the contract is to convey rights for as long as they exist. Although copyrights constitutionally subsist for only a finite period of time, the drafters use such terms as "forever" to mean as long as that period lasts. Therefore, . . . the term should be considered a shorthand for "the original and renewal term of copyright, plus any extensions, reversions, resurrections, or other circumstances that prolong the term."

Nimmer on Copyright § 10.14[N].

This contract does not demonstrate an intent to be co-authors of the joint work that is the motion picture

The Pink Panther. Instead, it provides that Richlin does not claim any rights in the motion picture. The Court interprets the Assignment as an objective manifestation of intent *not* to be co-authors.

Further, examining the three factors laid out by the Ninth Circuit in *Aalmuhammed* does not evince an intent to be co-authors or a joint work. Richlin did not superintend the motion picture by exercising control over it. There was no objective manifestation of a shared intent to be co-authors. Richlin's name was in the credits of the movie. He was recognized as a co-creator of the original story and screenplay. However, the movie was not designated as joint work with Richlin, Edwards, and MGM as the co-authors.

The plaintiffs assert that Richlin viewed himself as a joint author, but the evidence does not support that contention. First, Richlin assigned all his rights to Mirisch. Second, even it Richlin intended to be a joint author, the other participants did not so intend. Blake Edwards denies any joint authorship intention.[1] (Edwards Decl.) If Mirisch intended Richlin or Edwards to be joint authors they would have listed them as joint authors in the copyright.

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1. Additionally it would be illogical to conclude that the parties intended Richlin to be a joint author when Blake Edwards was not a joint author. Billed as "A Blake Edwards Production," *The Pink Panther* was co-written and directed by Edwards.

Appendix B

Finally, in determining whether a motion picture is a joint work, the Ninth Circuit has recognized the importance of "audience appeal." If the audience appeal of the work turns on Richlin's contributions to the Treatment, and the Richlin's share in the success of *The Pink Panther* cannot be appraised, this factor weighs in favor of finding Richlin a co-author of the joint work. It is in fact difficult (if not impossible) to determine how the Treatment factored into the success of the motion picture. The movie would not have been made without the underlying idea. However, the underlying basis provided only the starting point for a larger project which grew well beyond its beginning outline in the Treatment. This final factor weighs in favor of finding Richlin a co-author of a joint work. However, this factor balances against the other circumstances and it is not enough to establish that Richlin was an author of the motion picture. Because Richlin was not a co-author of the motion picture, his heirs do not have a valid copyright interest in the motion picture. Thus, the Court finds it proper to grant summary judgment in favor of the defendants.

2. *Statute of Limitations and Laches*

Because the Court finds that the plaintiffs do not have a valid copyright interest in *The Pink Panther*, it does not reach the issue of whether the claims are barred by either laches or the statute of limitations.

III. CONCLUSION

Based on the foregoing, the Court grants the motion for summary judgment and dismisses the case with prejudice.

IT IS SO ORDERED.

Dated: January 30, 2006

s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-55307

D.C. No. CV-04-09162-DDP
Central District of California, Los Angeles

BRADLEY RICHLIN; et al.,

Plaintiffs - Appellants,

LOUISE RICHLIN; et al.,

Appellants,

v.

METRO-GOLDWYN-MAY PICTURES, INC.; et al.,

Defendants - Appellees.

ORDER

Before: FERNANDEZ and WARDLAW, Circuit Judges, and COLLINS,* District Judge.

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

Appendix C

The panel has unanimously voted to deny the petition for panel rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc, and Judges Fernandez and Collins recommended denying it.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

IT IS SO ORDERED.

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTION OF THE
UNITED STATES OF AMERICA
ARTICLE I. LEGISLATIVE DEPARTMENT

USCS Const. Art. I, § 8, Cl 8

Sec. 8, Cl 8. Patents and copyrights.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Appendix D

17 U.S.C. § 101

TITLE 17. COPYRIGHTS
CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

17 USCS § 101

§ 101. Definitions

* * *

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

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Appendix D

17 U.S.C.S. § 304

TITLE 17. COPYRIGHTS
CHAPTER 3. DURATION OF COPYRIGHT

17 USCS § 304

§ 304. Duration of copyright: Subsisting copyrights

(a) Copyrights in their first term on January 1, 1978.

(1) (A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2) (A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3) (A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1) (B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested,

under paragraph (2) (A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4) (A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the

end of that 1-year period shall be within the discretion of the court.

(b) Copyrights in their renewal term at the time of the effective date of the Sonny Bono Copyright Term Extension Act. Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective [effective Oct. 27, 1998] shall have a copyright term of 95 years from the date copyright was originally secured.

(c) Termination of transfers and licenses covering extended renewal term. In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to

exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a ~~furt~~her grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons

provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) Termination rights provided in subsection (c) which have expired on or before the effective date of the Sonny Bono Copyright Term Extension Act. In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act [effective October 27, 1998] for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

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(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.

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1909 Copyright Act, Section 3 — Protection of component parts of workcopyrighted; composite works or periodicals

The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.

July 30, 1947, c. 391, 61 Stat. 654; Oct. 31,1951, c. 655, § 16(a), 65 Stat. 716.

1909 Copyright Act, Section 10 — Publication of work with notice

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

July 30, 1947, c. 391, 61 Stat. 656.

APPENDIX E — TREATMENT

THE PINK ~~RAJAH~~ PANTHER

By

Maurice Richlin

&

Blake Edwards

April 13, 1962

Copy #2

The Pink Rajah

PRINCESS DALA, beautiful East Indian Princess, is skiing on the slopes of a well-known European winter resort. Watching her through binoculars is the handsome millionaire sportsman, SIR CHARLES, Earl of Whittingham. He lowers his binoculars and skis back toward the Lodge.

An afternoon champagne party is being held in the snow as Sir Charles skis up to the Lodge. He is greeted by a portly Elsa Maxwell type and promises that he will certainly attend her party that afternoon. As Sir Charles enters the Lodge, Elsa and a novelist type discuss the attractive bachelor. And also the Princess. We discover that the Princess has recently fled her native country because of junta that deposed the former government.

Appendix E

In his suite at the Lodge, Sir Charles gets a phone call from Paris. It is SIMONE CLOUSSEAU. She tells him that she and her husband are leaving from there for the ski resort.

As Simone hangs up, her husband enter the bedroom with some clothes which he packs into one of the suitcases. We discover that M'SIEUR CLOUSSEAU is an Inspector with the Surete. He is going to the ski resort on official business. He knows Simone can't bear to be away from him. He just hopes she will not be bored. She is sure she will not.

Elsa's party is swinging that night. Sir Charles and the rest of the International Set are there. Sir Charles goes out on the balcony. He drops his keys to the snow below. A MAN comes out of the shadows below, picks up the keys and scurries off. A few minutes later, Sir Charles excuses himself; leaves.

At the Lodge desk, Sir Charles waits as MR. CAMPBELL SMYTHE checks in. He asks to be announced to the Princess – he's from Lloyds of London. Sir Charles then asks the MANAGER for a duplicate set of keys – he seems to have lost his. The Manager gives Sir Charles the keys. Sir Charles goes to his suite.

Sir Charles enters his bathroom, opens the medicine cabinet, takes out a bottle. On the back of the bottle, there is a message: The dog in The Giant Slalom. Sir Charles strolls out on his balcony, lights a cigarette. The

Appendix E

Princess is on her terrace. The flare of light attracts her attention. For a moment, their eyes meet. Her MALE SECRETARY comes out on the terrace, bows, speaks to her. She enters her suite.

The man from Lloyds, Mr. Smythe, greets the Princess deferentially. He states his business; her country's suit before the World Court to recover her diamonds; the precedent in Russia to recover the Romanoff diamonds. The World Court's decision may well go against her. She feels that the diamonds are hers – they are, in fact, the family jewels. Mr Smythe also worries about the safety of the jewels, particularly the giant gem – The Pink Rajah. Has she not heard of Le Pouf, the greatest jewel thief of all? The Pink Rajah must draw him like a magnet. She reassures Mr. Symth. She leads a quiet, secluded life. She is safe from Le Pouf.

The Giant Slalom is in progress. Sir Charles starts down the slope. We cut to the Princess. At that moment, a man cuts her dog's leash, snatches up the dog and races off. He stumbles and drops the dog in the snow. Sir Charles takes a terrible spill to avoid hitting the dog. He lies very still in the snow. In the confusion, the man picks up the dog and makes his escape. Two men carry Sir Charles to the Lodge on a stretcher.

The Inspector and Simone are at the desk, registering. Sir Charles is carried past on the stretcher. Simone asks one of the men what happened. She is told and murmurs a polite "That's too bad." She and the Inspector follow the bellboy to their room.

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In their room, the Inspector tells Simone that he's going to check the floor plan of the Lodge with the Manager. She agrees that it's a good idea to know where everyone is. The Inspector leaves. She waits a moment. Simone walks to a side door, enters Sir Charles' suite. He is lying in bed.

Sir Charles leaps out of bed and embraces Simone. She tells him all about the Inspector's plans. The Inspector, she says, feels that this time he will certainly capture Le Pouf. The Pink Rajah will attract him like a mouse to cheese and he, the Inspector, will spring the trap. Sir Charles wishes the Inspector good luck but wishes he'd work on his metaphors.

There is a knock at Sir Charles' door. Simone quickly returns to her room. Sir Charles goes to the door. The Princess's Secretary extends an invitation from the Princess for dinner, if he is able. Sir Charles says he will make the effort. The Secretary says that the Princess is most grateful to Sir Charles for his actions during the Giant Slalom.

The Inspector goes over the floor plan of the Lodge with the Manger. Mr. Smythe, the agent from Lloyds, greets the Inspector. We find that they are old friends; have worked together before on many jewel thefts, executed by Le Pouf.

Sir Charles has dinner with the Princess in her suite. They are never alone. The male Secretary and others of her entourage seem to hover about. Sir Charles eyes

them, a bit annoyed. It is apparent, immediately, that the Princess is intrigued with Sir Charles, but does not like what he stands for. The seemingly devil-may-care, internationally famous playboy is not exactly her cup of tea. And because she is intrigued, her displeasure is greatly pronounced.

Simone with her husband and Mr. Smythe at the bar when GEORGE SUTTON enters the Lodge, looks about. George is wearing a bowler and carries a suitcase and a furled umbrella. He tells them he's looking for his father. "Perhaps you know him? Sir Charles Whittingham". Simone spills her drink on Mr. Smythe and herself. She quickly excuses herself, saying she must change her gown. Simone exits, goes outside.

Sir Charles at dinner with the Princess. He asks her if she's frightened of him. She says she doesn't understand. He says that obviously his reputation has scared her, otherwise she wouldn't find it necessary to find excuses to keep the room filled with her entourage.

She tells him that his vanity amuses her, nothing more. Suddenly, Sir Charles spots Simon outside a window, gesturing to him. The Princess tells Sir Charles that he if free to leave if he'd like. (sic) Sir Charles bows and limps out.

Simone makes an effort to intercept Sir Charles and runs right into her husband. She makes up an excuse for being outside and follows her husband to their room.

Appendix E

Sir Charles gets outside, looks around for Simone, can't find her, shrugs and goes up to his suite.

Sir Charles gets a phone call from the Princess. She apologizes for the quarrel at dinner. Perhaps she was wrong. Sir Charles invites her up for a drink - - "Unless you are frightened at the thought of being alone with a man." The Princess accepts his challenge.

Simone and the Inspector are in their room, preparing for bed. Simone desperately tries to think of an excuse to get out and warn Sir Charles that a man calling himself Sir Charles' son is at the Lodge. She finally says she needs a glass of warm milk before she can sleep. The Inspector says they can call room service, but Simone feels exercise, plus the warm milk will help even more to make her sleep. He tells her to bring him a glass, too. She exits.

Simone walks down the hall, taps on Sir Charles' door. Suddenly, she sees the Princess coming down the hall. Simone turns around, goes back into her own room.

The Inspector is in bed. He wants his milk. She changed her mind, she says. After all, why would she want warm milk when she has him? The Inspector shrugs. "Women! Who can understand them?"

Sir Charles and the Princess have their drinks in front of a roaring fire. They talk. She tells him people don't understand about royalty. A Princess is born to a certain life. She works at her job. She worries about her people.

Appendix E

Her job is ended. No job. He refills her drink, touches her cheek. Poor little Princess. No job – no people. This is a terrible century for a princess. But if it will make her happy, he'll be her subject. She is getting drowsy. She nods. She'd like that. He tells her that as her loyal subject, his main concern is to see that she gets enough sleep. She nods again, happily, as he picks her up. Sir Charles carries the Princess into his darkened bedroom, gently places her on the bed. The light goes on. Sir Charles discovers he's put the Princess in bed with George. George looks up sleepily and says, "Hi, Dad."

Sir Charles awakes the next morning. His son is gone. He looks out the window and sees George having Breakfast with the Princess on her terrace. Simone enters from the next suite. The Inspector is in the village to see the local police. She tells him she tried to warn him last night about George. Sir Charles says he never mentioned his son, born in America. Attended Harvard law school – a real white sheep. As a matter of fact, Sir Charles has avoided the United States ever since George was born. Sir Charles tells Simone she must take George skiing – keep him out of the way while Sir Charles takes care of some very important business with the Princess.

The Princess and George are finishing breakfast when Sir Charles joins them. She tells Sir Charles that she fells very close to his son. George is entering the Peace Corps and is going to help her people. Doctor Schwitser is his hero, George says modestly. Simone comes by; is introduced to the Princess and George. George accepts

her invitation to ski. Princess is leaving on afternoon train. Sir Charles will see her off.

George and Simone ski near a cabin on an upper slope. Simon is flirtatious, George grabs for her. Flustered, she enters the cabin – they are both on skis. Suddenly, George rushes her – she steps to one side and George hurtles out the open door and down the steep slope, completely out of control.

The Inspector with the local POLICE CHIEF. The Inspector sees Sir Charles and the Princess arrive at the train station. Sir Charles spots the dognapper – leaps into the sleigh and gives chase. The dognapper, with the dog under his arm, flees in a small car. When they get out of sight of the Princess, the dognapper leaps out of his car, still holding the dog, and Sir Charles jumps out of the sleigh. Sir Charles and the dognapper stage a fight as the Princess and the Inspector appear. Suddenly, from nowhere, George skis into frame, still out of control, passes the dognapper and skis off, the dog now in his arms. He skis on, skids to a stop near the Princess. She takes the dog, tells George she is forever in his debt. Princess has missed her train.

Festival that night. Table with Princess, George, Sir Charles, Simone and the Inspector. Checking on car – facts about Le Pouf – Princess sees Secretary and excuses herself. Simone and George dance. George suggests a later rendezvous. He will find a way to get rid of her husband.

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The male Secretary informs the Princess that a Delegation from her homeland is on the way to her villa in the south of France, to discuss the return of the jewels. The Princess says they must leave for the villa at once.

George disguises his voice and calls the Inspector. He says he is the town Chief of Police and has some interesting information about the car of the dognapper.

Sir Charles calls the Princess – is turned down.

Simone knocks on the door – Sir Charles goes into Simone's room. There is a knock at the hall door – it is George. The door to Sir Charles's suite has locked – Sir Charles hides. George enters and goes on the make for Simone. George glances out the window, sees the Princess's servants carrying out her baggage. He tells Simone he has to leave. He wants to study the Icelandic legal system. He leaves to pack.

The Inspector is knocking on the door of the Police Chief's home in the village. The Chief sleepily looks out. The Inspector finds that the Chief didn't call him. The Inspector observes the Princess on her way to the train station.

The Princess her entourage and baggage arrive at the station. The Inspector watches as she enters the train. He also observes George getting on the train. The Inspector returns to the Lodge. He informs Simone of Princess and George's departure. She exits for milk again – Inspector receives call from the Surete in Paris,

regarding the dognapper's car. The description of the man who rented the car fits that of a man who has been in Sir Charles's employ for a number of years.

Simone telling Sir Charles about George and Princess; suggest that Sir Charles is falling in love. Knock. Simone hides. Enter the Inspector. A cat and mouse scene between Sir Charles and the Inspector.

On the train, George pretends surprise upon meeting the Princess, tells her he is going to south of France. She invites him to be her houseguest. George thanks her and returns to his compartment. The Secretary wonders if that was a wise invitation. The Princess nods - "It could not have been better. Now I will have a witness."

Sir Charles calls Assistant who is waiting for the call in a room overlooking the Princess's villa. Sir Charles warns him to stay put – the Inspector is suspicious. Sir Charles is on his way there.

The Inspector alerts resort local police and Lodge staff to watch Sir Charles. But in spite of the precautions, Sir Charles cleverly makes his escape.

Next morning, the Assistant is watching from his vantage point, through binoculars. He observes the Delegation from the Princess's homeland arrive at the Villa.

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Scene with Princess and Delegation, including George. The Delegation informs the Princess that she will have to give up the Pink Rajah, and the other jewels.

Sir Charles arrives. He tells Assistant he's decided to call off the theft. Assistant has received a call from Simone, so is aware of the situation. He is aware of Sir Charles' feeling regarding the Princess. He shows Sir Charles interesting scene through binoculars. Princess and George are at the pool. They seem to be making love. Sir Charles quickly changes his mind and says the plan is on again. They will strike that night.

Inspector and Mr. Smythe arrive at the villa. Inspector warns Princess they have reason to believe Le Pouf is going to steal the Pink Rajah. She invites them to dinner. The Inspector will have guards stationed about the villa.

Sir Charles walking through street of town, Picks up police "tail". Is aware of it.

That night. Princess' guests arrive. She asks about Le Pouf. The Inspector says they know where he is. He can't make a move without their knowledge.

Sir Charles casually gets into the car. He is "tailed". He goes around a corner, jumps out. His assistant, who has been lying on the car floor boards, takes the wheel and Sir Charles watches the police "tail" follow the assistant away.

Appendix E

The Princess is showing her guests the Pink Rajah. She puts it back into the safe as George and the others watch.

Sir Charles eludes the guards around the villa. Climbs up ivy to second story of villa. Climbs on balcony and enters.

The Princess' Secretary pulls the fuse switch, throwing the villa into darkness.

Utter confusions reins, as the guests jostle about. George tells Simone that this his chance to grab the jewel.

Sir Charles and George arrive at the safe simultaneously. When the Inspector and his men enter, Sir Charles makes it appear as if his son has captured him. The Inspector says to Sir Charles, "At last we have you, M. Le Pouf." Sir Charles shrugs, points to safe and says the Inspector has no evidence, the safe is locked, the jewel is safe. The Princess opens the safe. The Pink Rajah is gone. In its place is Le Pouf's signature – a white glove with his monogram. Sir Charles is startled. He honestly tells the Inspector that he does not have the Pink Rajah. The Inspector says he must have tossed it out the window to a confederate. The police take Sir Charles away.

Simone and George the next day. George discovers the truth about Sir Charles' past. If Sir Charles does not have the Pink Rajah, there is only on person who does have it.

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George and the Princess. The Princess admits she stole the jewel herself. She would do anything to protect Sir Charles, but doesn't know how without exposing her complicity – even that she is willing to do, if there is no other alternative. George says there is an alternative, and asks her for the Pink Rajah.

George slips the jewel to Simone. Tells her she knows what to do.

Sir Charles is on trial. After the Inspector gives his damaging evidence about Sir Charles, the Defense calls a surprise witness – the Inspector! The Inspector looks surprised. Simone pats his cheek, arranges his handkerchief. He goes to the stand. The Defense agrees that Sir Charles was at every party where jewels were stolen, but there was one other person there, too. It was the Inspector. The Defense piles up other evidence. The Inspector is shocked beyond speech. Then he protests, but the Defense continues to score points. "What is worse," the Defense contends: "is a man who is supposed to defend his country against criminals becoming a criminal himself!" the Defense points, "*You*, my friend, stole the Pink Rajah!" The Inspector pulls his handkerchief out of his breast pocket to wipe his brow. With shock, he watches as the necklace, containing the Pink Rajah, falls out of his handkerchief.

The Inspector is led off by the police. Sir Charles, the Princess, George and Simone pair off. The Inspector is led down the steps to the street.

Appendix E

An admiring crowd cheers the man they think is Le Pouf. Women pelt him with flowers – a girl breaks through the police cordon and embraces the Inspector. A newspaper reporter asks the Inspector how he, Le Pouf, was able to pull off all his amazing exploits. The Inspector starts to protest his innocence, then realizes he is enjoying being Le Pouf. "Frankly", he says, "It wasn't easy."

APPENDIX F — LITERARY - ASSIGNMENT OF ALL RIGHTS

KNOW ALL MEN BY THESE PRESENTS:

1. That BLAKE EDWARDS and MAURICE RICHLIN for and in consideration of the sum of One Dollar DOLLARS ($1.00), and other good and valuable consideration in hand paid by THE MIRISCH CORPORATION OF DELAWARE (hereinafter referred to as the "purchaser"), the receipt of which sum is hereby acknowledged, have given, granted, bargained, sold, assigned, transferred and set over, and by these presents do give, grant, bargain, sell, assign, transfer, and set over, forever, unto the purchaser, that certain story (which term shall cover all literary material written by me in connection therewith including any adaptations, treatments, scenarios, dialogue, scripts and/or screenplays) entitled: "PINK RAJAH" also entitled or known as "PINK PANTHER" (hereinafter referred to as the "work") also the title, theme, and all contents thereof; together with all now or hereafter existing rights of any kind and character whatsoever pertaining to the work, whether or not such rights are now known, recognized, or contemplated, and the complete and unconditional and unencumbered title in and to the work for all purposes whatsoever. The term "work" shall be deemed to include said story, its stage and other version, and music (if any), and the theme, plot, characters, story, title, copyright, and all rights and interests of whatever kind pertaining thereto.

2. I further give, grant, bargain, sell, assign, transfer and set over, forever, to the purchaser, the

absolute and unqualified right to use the work, in whole or in part, in whatever manner said purchaser may desire, including (but not limited to) the right to make and/or cause to be made, literary, dramatic, speaking stage, motion picture, photoplay, television, radio and/or other adaptations of every kind and character, of the work, or any part thereof; and for the purpose of making or causing to be made such adaptations or any of them, the purchaser may adapt, arrange, change, novelize, dramatize, make musical versions of, interpolate in, transpose, add to and subtract from the work and/or the title thereof, to such extent as the purchaser in its sole discretion may desire, and may likewise translate the same into all or any languages. The purchaser shall have the right to use my name as the author of the literary composition upon which said adaptations, or any of them, are based; and shall have the further right to use the title of the work in conjunction with any adaptations of the work, or any part thereof; and/or the purchaser may use in connection with such adaptations, or any of them, any other title or titles which it may select, and/or the purchaser shall have the right to use the title of the work in connection with any literary, dramatic or other works, not based upon the work. The purchaser shall also have and is hereby given the right to obtain copyright in all countries upon the work and upon any and all adaptations thereof, including the right of acquiring copyright in all countries upon any motion pictures based in whole or in part upon the work. The purchaser is hereby given the rights and privilege to use my name and/or likeness in connection with any motion picture and/or other version of the work and in

connection with the advertising, exploitation and publicity of ay such motion picture and/or other version.

3. Without in any manner limiting or derogating from the generality of the rights hereinabove in paragraphs 1 and 2 granted to the purchaser, I hereby give, grant, bargain, sell, assign, transfer and set over, forever to the purchaser, the sole and exclusive motion picture rights, including all silent, sound, talking and musical motion picture rights, and synchronized picture rights throughout the world in and to the work, also the title and theme thereof, together with the sole and exclusive right, license and privilege of using the work and title for motion picture purposes, including all silent, sound, talking and musical motion picture and synchronized picture purposes; also the sole and exclusive right to make motion picture films and photoplays based in whole or in part on the work, including sequels thereto, or motion pictures or photoplay containing any character or characters of the work whether or not said motion pictures or photoplays are based on the work, together with the right to sell, lease, license and generally deal and traffic in the same and/or recordations and/or reproductions thereof throughout the world at any and all times. The term "photoplay," as used in this instrument, shall be deemed to include, but not limited to, motion picture productions produced, transmitted and/or exhibited with sound and voice recording and reproducing devices, radio and television devices and all other now existing or future improvements and devices which are now or may hereafter be used in connection with the production,

transmission and/or exhibition of motion picture productions. All rights necessary to produce, transmit and/or exhibit such motion picture version or versions of the work, accompanied by such sound and voice recording and reproducing devices, radio and television devices and all other existing or future improvements and devices which are now or may hereafter be used in connection with the production, transmission and/or exhibition of motion picture productions, are hereby transferred and assigned to the purchaser. I further agree that the rights herein granted and assigned to purchaser include, without limitation, all television rights in and to the work with the sole and exclusive right to televise the work or any version or adaptation thereof by means of motion pictures produced primarily for television use or so-called live television programs or otherwise, either theatrically or non-theatrically and in connection with sustaining, non-sustaining and sponsored programs, and/or by means of so-called subscription television for which a viewing fee or charge is imposed either directly or indirectly, and by any other means now known or hereafter devised, which television uses may be in conjunction with and/or for the purpose of the advertising, publicizing and exploitation of any product, commodity, service or facility, without any restrictions whatever, and the sole and exclusive right throughout the world in perpetuity to utilize the title, plots, themes and characters of the work for the foregoing purposes. Purchaser shall have the right but not the obligation to use the title of the work and/or any other title or titles selected by purchaser as the title of any such motion picture and/or television productions

based on the work or any part thereof, and the right to use the title of the work in conjunction with motion picture and/or television productions not based on the work. The provisions of this paragraph shall not be deemed or construed in any manner to limit or derogate from the generality of the full and complete rights granted to purchaser under the provisions of paragraphs 1 and 2 hereof.

4. I hereby represent and warrant and I am the sole author and owner of the work, together with the title thereof; that I am the sole owner of all rights of any and all kinds whatsoever in and to the work, throughout the world; that there has been no publication or any other use of the work, or any part thereof, with my knowledge or consent anywhere in the world; that I have the sole and exclusive right to dispose of each and every right herein granted and/or purported to be granted; that neither said work nor any part thereof is in the public domain; that no motion pictures or any other works have been produced which have been based in whole or in part upon the work; that I have in no way conveyed, granted, or hypothecated any rights of any kind or character in or to the work, or any part thereof; to any person whomsoever other than the purchaser, nor have I granted any right, license, or privilege with respect to any of the rights herein granted and/or purported to be granted to any person other than the purchaser; that I have not done or caused or permitted to be done any act or thing by which any of the rights herein granted and/or purported to be granted to the purchaser have been in any way impaired; and that I will not at any time

execute any further agreement or agreements in conflict herewith, nor will I in any way attempt to encumber the rights herein granted, nor will I do or cause or permit to be done any act or thing by which the rights herein granted and/or purported to be granted to the purchaser may in any way be impaired. I further represent and warrant that the work is original with me in all respects; that no incident therein contained and no part thereof is taken from or based upon any other literary or dramatic work or photoplay or in any way infringes upon the copyright or any other right of any individual, firm, person, or corporation; and that the reproduction, exhibition or any other use by the purchaser of the work in any form whatsoever will not, in any way, directly or indirectly infringe upon the rights or any individual, firm, person or corporation whatsoever. In the event the work is an adaptation of or a treatment or screenplay based upon a literary work owned by purchaser, then the foregoing warranties shall not apply to those portions of the work taken directly from purchaser's literary work.

5. I hereby appoint the purchaser my true and lawful attorney irrevocably, but for the sole benefit of the purchaser, to constitute and prosecute such proceedings as the purchaser may deem expedient to protect the rights herein granted and/or purported to be granted and/or effect the recovery by the purchaser of damages and penalties for the infringement of said rights, and/or to secure to the purchaser the full benefit of all rights herein granted and/or purported to be granted. The purchaser may sue in its own name and/

or may use my name, and/or at its option, may join me as party plaintiff or defendant in any suit or proceeding brought for such purpose or purposes.

6. I hereby guarantee and warrant that I will indemnify, and make good and hold harmless the purchaser of, from and against any and all loss, damage, costs, charges, legal fees, recoveries, judgments, penalties and expenses which may be obtained against, imposed upon or suffered by the purchaser by reason of any infringement or violation or alleged violation of any copyright or any right of any person, firm or corporation, or by reason of or from any use which may be made of the work of the purchaser, or by reason of the breach of any term, covenant, representation or warranty herein contained, or by reason of anything whatsoever which might prejudice the securing to the purchaser of the full benefit of the rights herein granted and/or purported to be granted. The foregoing guarantees and warranties shall not apply to any changes in the work which may be made by the purchaser.

7. I hereby agree to duly execute, acknowledge and deliver and/or to procure the due execution, acknowledgment and delivery to the purchaser of any and all further assignments and/or other instruments which in the sole judgment and discretion of the purchaser may be deemed necessary or expedient to carry out or effectuate the purposes or intent of this present instrument.

Appendix F

8. If this instrument be executed by two or more persons, then and in that event this agreement shall be binding jointly and severally upon said persons, and each of them, and each and all of the representations, warranties, agreements and obligations hereinabove set forth shall be deemed to be the joint and several representations, warranties, agreements and obligations of said persons, and each of them; and wherever the context so requires, the masculine gender shall include and apply to all genders, and the singular shall apply to and include, as well, the plural. The term "purchaser" as used herein shall include the purchaser herein named and as well its successors and assigns. The purchaser may assign, transfer and grant all or any part of the rights herein granted it to any individual, firm, person or corporation, without limitation, and shall enjoy its rights hereunder in perpetuity, as long as any rights in the work are recognized in law or in equity, except insofar as such period of perpetuity may be shortened due to any copyrighting by the purchaser of the work and/or any adaptation or adaptations thereof, in which case the purchaser shall enjoy its rights hereunder for the full duration of such copyright or copyrights, including any and all renewals thereof.

Appendix F

IN WITNESS WHEREOF I have hereunto set my hand this **24th** day of **May** 1962

/s/ Blake Edwards
BLAKE EDWARDS

/s/ Maurice Richlin
MAURICE RICHLIN

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(3)

Supreme Court, U.S.
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No. 08-534

In the

Supreme Court of the United States

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS, ABIGAIL RICHLIN SCHWARTZ, LOUISE RICHLIN, ELYSSA PARTON and MICHELLE FORKEL,

Petitioners,

vs.

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Ninth Circuit itself stated in *Aalmuhammed v. Lee*, the Ninth, Second and Seventh Circuits are all in accord that to be deemed a "joint author" of a copyrighted work a contributor must demonstrate that each of the putative authors mutually intended to be joint authors.

2. Whether the Ninth Circuit correctly determined that Maurice Richlin ("Richlin"), the co-author with Blake Edwards ("Edwards") of a treatment (the "Treatment") for the original 1963 motion picture *The Pink Panther* (the "Motion Picture"), was not a joint author of the Motion Picture where no one, including Richlin himself, ever intended Richlin to be a joint author of the Motion Picture.

3. Whether this Court should review Petitioners' claim, purportedly arising under *Stewart v. Abend*, that they owned an interest in the purported renewal term copyright of the Treatment when, as found by the District Court and the Ninth Circuit, they expressly waived that claim.

4. Whether the Ninth Circuit correctly held that there is no statutory renewal term copyright for the Treatment because the Treatment: (a) was merely an incorporated component of the Motion Picture; (b) was never separately copyrighted, *i.e.*, published, registered or renewed; and (c) as Petitioners admitted, never had its own independent statutory original or renewal term copyright.

5. Whether there are compelling reasons to review Petitioners' renewal term copyright claim arising under the Copyright Act of 1909 (the "1909

Act") and *Stewart v. Abend* (interpreting the 1909 Act), where the last original term of copyright for any work subject to the 1909 Act's two-term system ended on December 31, 2005, so that it is unlikely that there will be very many, if any, claims in the future involving the 1909 Act's statutory copyright principles addressed in this case.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners Bradley Richlin, Lance Richlin, Mark Mannis, Abigail Schwartz, Louise Richlin, Elyssa Parton and Michelle Forkel are individuals.

Respondent Metro-Goldwyn-Mayer Pictures Inc. states that its parents are MGM Holdings, Inc., MGM Holdings II, Inc. and Metro-Goldwyn-Mayer Inc.

Respondent Geoffrey Productions, Inc. states that it has no parent companies and no publicly held company owns more than 10% of its stock.

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Other Authorities

Husbands, Copyright Office Board of Appeals Letter, Control No. 10-600-754-2(C), (May 14, 2002) *available at* http://www.ipmall.info/hosted_resources/Copyright Appeals 25, 26

J. David Yarbrough, Jr., Comment, What's Mine Might Be Yours: Why We Should Rethink The Default Rule for Copyright Ownership in Joint Works, 76 Tul. L. Rev. 493, 508 (2001) 13

INTRODUCTION

There is no "compelling reason" for this Court to review the Ninth Circuit's well-supported opinion here. While this case involved the interesting history behind the popular 1963 motion picture *The Pink Panther*, it was otherwise a straightforward copyright dispute dealing with uncontroversial joint authorship law and long-settled principles regarding the requirements for independent statutory copyright under the law of the 1909 Act.[1]

In short, Petitioners have pursued this action to this point because they refuse, unreasonably, to accept well-settled law. Petitioners' overall argument, in the petition and from the beginning of this lawsuit, is characterized by their repeated question: Why is it that in *Stewart v. Abend*, 495 U.S. 207 (1990) the successor of the author of the story underlying the film *Rear Window* was entitled to vesting or "reversion" of the renewal term copyright in that story under § 304 of the Copyright Act, but here, Petitioners, the heirs of a co-author of the Treatment for the Motion Picture, are not? *See* Pet. 2-3, 16-20.

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[1] The current Copyright Act, known as the Copyright Act of 1976 (the "Copyright Act"), effective as of January 1, 1978, superseded the 1909 Act. The law under the 1909 Act remains pertinent to this case because a) it still applies to certain issues for works created prior to 1978; and b) the Copyright Act incorporates certain key principles of the law under the 1909 Act. *See* Pet. App. 6a-7a, 10a-11a. For example, the provisions concerning the 1909 Act's two-term system and who is entitled to the renewal term copyright are incorporated in § 304 of the Copyright Act. 17 U.S.C. § 304.

The Ninth Circuit, applying bedrock principles of copyright law, directly and correctly answered Petitioners' question:

> Richlin died in 1990. Had the Treatment become the subject of statutory copyright as a separate and independent work, its renewal term would not commence until 1991. According to the Richlin heirs, because Richlin, like Woolrich [in *Stewart*], died before the right to renew the copyright vested, the right to renew the copyright in the Treatment reverted to them. The disconnect in this theory is that, unlike the story "It Had to Be Murder," an independent work, the Treatment was never the subject of federal copyright protection as an independent work. Because it never was invested with statutory copyright protection, there was no right to renew and, therefore, no renewal right to revert to the Richlin heirs.

Pet. App. 27a-28a (emphasis added).

> In the end, the Richlin heirs ask us to consider one question: "For what reason should Richlin's heirs be treated any differently than the heirs of any other author?" The answer is clear: Richlin failed to secure federal statutory copyright protection for the Treatment. Therefore, the Treatment as such was never invested with statutory copyright, and a right to renew the original term of statutory copyright neither vested in Richlin nor reverted to his heirs. Because Richlin neither co-owned nor coauthored the Motion Picture, neither he nor his heirs have any interest in its copyright.

Pet. App. 32a-33a.

Contrary to Petitioners' assertion (*e.g.*, Pet. 2-3, 25), the Ninth Circuit's decision does not conflict in any way with *Stewart* because the underlying work in *Stewart* had its own independent *statutory* copyright, and the Treatment here did not. It is well-settled that the term "copyright" in the 1909 Act, as now incorporated in § 304(a) of the current Copyright Act, refers exclusively to "statutory" copyrights. *See Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998). Since there never was a statutory copyright in the Treatment, a point that Petitioners conceded, there was no cognizable renewal term copyright in the Treatment. Without a statutory renewal copyright in the Treatment, there was simply nothing that could have vested in Petitioners under § 304 of the Copyright Act.

Respondents moved for summary judgment on this very basis. In response, Petitioners abandoned their claim based on reversion of the purported renewal copyright in the Treatment, and instead claimed that Richlin was a joint author of the entire Motion Picture because he was one of the two authors of the Treatment. Given the reality of major motion picture production, the very idea that the producers of the Motion Picture, who invested millions of dollars to produce the Motion Picture, ever intended to be joint authors with Richlin, which would have given him the unfettered right to exploit the Motion Picture on his own, merely because he contributed a 13-page rough outline is absurd. That is why, as the courts below held, all of the written agreements and other undisputed evidence established that the parties, including Richlin himself, never intended Richlin to be a joint author in the Motion Picture.

Now, in what is merely an effort to obtain yet another level of appellate review, Petitioners assert that there is a supposed "split" between the Ninth Circuit, on the one hand, and the Second and Seventh Circuits, on the other, regarding the standards for determining the mutual intent required for joint authorship. Pet. 10-13. Petitioners are plainly wrong. These circuits uniformly require a person claiming to be a joint author of a work to prove that all parties intended to be joint authors of the work with each other. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1233-34 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195, 201-02 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

Indeed, Petitioners' contention is flatly contradicted by the Ninth Circuit's own statement that its standards for determining joint authorship are essentially the same as those of the Second and Seventh Circuits:

> Although the Second and Seventh Circuits do not base their decisions on the word "authors" in the statute, the practical results they reach are consistent with ours. These circuits have held that a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.

Aalmuhammed v. Lee, 202 F.3d at 1233-34.

Applying this uniformly-accepted requirement here, the Ninth Circuit correctly held that Richlin was not a joint author of the Motion Picture because the evidence demonstrated unambiguously that Richlin was never intended to be a joint author.

Pet. App. 15a. Petitioners do not even attempt to meet their burden of demonstrating how a court in the supposedly "conflicting" Second or Seventh Circuits could have reached a different result on these same facts. Accordingly, the Ninth Circuit's opinion (the "Opinion") is not "in conflict with the decision of another United States court of appeals" (Sup. Ct. R. 10(a)) and there is no need for the Court to grant certiorari here.

STATEMENT OF THE CASE

Respondents hereby incorporate and respectfully refer the Court to the Opinion for an accurate and detailed recitation of the material facts and procedural history of this case. Pet. App. 4a-8a.

REASONS FOR DENYING THE PETITION

I. There Is No "Circuit Split" Relating To The Ninth Circuit's Determination That Richlin Was Not A Joint Author Of The Motion Picture.

Petitioners erroneously assert that the Ninth Circuit's approach for determining when a person can be considered a joint author of a joint work, set forth in *Aalmuhammed* and applied by the Ninth Circuit here, conflicts with the Second and Seventh Circuits' approach. Pet. 9-10. There is no such "circuit split" concerning any issue in this case.

A. The Circuits Uniformly Require That, To Be Deemed A Joint Author, A Contributor Must Prove That Each Joint Author Intended To Be Joint Authors With The Other.

Because a finding of joint authorship has such significant consequences for the authors and the use of the work,[2] the Second, Seventh and Ninth Circuits, among other circuits, all hold that for a contributor to be deemed a joint author he or she must prove something substantially more than merely that his or her contribution was "intended to be merged . . . into a unitary whole." *See Aalmuhammed,* 202 F.3d at 1231-32; *Thomson,* 147 F.3d at 201-02; *Erickson,* 13 F.3d at 1069; and *Childress,* 945 F.2d at 505-07. The Second, Seventh and Ninth Circuits are all in accord that a person claiming to be a joint author of a work must establish that each of the joint authors fully intended to be joint authors with each other. *See Aalmuhammed,* 202 F.3d at 1234; *Thomson,* 147 F.3d at 200; *Erickson,* 13 F.3d at 1071-72.

There is, thus, no disagreement or "split" among the circuits on the single dispositive joint authorship issue here: that the Ninth Circuit correctly found, not only that Petitioners failed to meet their burden of proving that the parties intended to be joint authors of the Motion Picture, but, in fact, that

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[2] For example, each "joint author" of a joint work is entitled to an equal undivided interest in the whole copyright — "in other words, each joint author has the right to use or license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made." *Thomson,* 147 F.3d at 199.

the putative authors, Edwards, Mirisch Co. (the producer) and Richlin did *not* intend to be co-authors with each other in the Motion Picture. Pet. App. 15a-16a.

The Ninth Circuit in *Aalmuhammed* repeatedly cites the Second Circuit's decision in *Thomson* for support throughout its opinion. The *Aalmuhammed* court made it clear that its standard is in accord with the Second Circuit's joint authorship analysis, "especially the thoughtful opinion in *Thomson v. Larson*." *Aalmuhammed*, 202 F.3d at 1234. For example, the Ninth Circuit stated:

> The Second and Seventh Circuits have likewise concluded that contribution of independently copyrightable material to a work intended to be an inseparable whole will not suffice to establish authorship of a joint work. Although the Second and Seventh Circuits do not base their decisions on the word "authors" in the statute, the practical results they reach are consistent with ours. These circuits have held that a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.

Aalmuhammed, 202 F.3d at 1233-34 (emphasis added).

Here, the Ninth Circuit correctly found that all the evidence, including Richlin's Assignment, Employment Agreement and the surrounding circumstances, established that Richlin was never intended to be a joint author of the Motion Picture. Pet. App. 14a-15a.

B. The Ninth Circuit's Three Joint Authorship Criteria Do Not Conflict With The Second And Seventh Circuits' Approach.

In *Aalmuhammed*, the Ninth Circuit identified three non-exclusive criteria that are to be used, in the absence of a contract, to aid a court in determining whether the parties are joint authors in a joint work:

> First, we determine whether the "putative coauthors ma[de] objective manifestations of a shared intent to be coauthors." A contract evidencing intent to be or not to be coauthors is dispositive. Second, we determine whether the alleged author superintended the work by exercising control. Control will often be the most important factor. *Id.* Third, we analyze whether "the audience appeal of the work" can be attributed to both authors, and whether "the share of each in its success cannot be appraised." (quotations omitted).

Pet. App. 12a-13a (citing *Aalmuhammed*, 202 F.3d at 1234).

Petitioners assert vaguely that these three factors "improperly constrict" the definition of an author of a joint work or otherwise somehow conflict with the other circuits' approach. Pet. 9-10. Petitioners are wrong.

Far from conflicting with the Second and Seventh Circuit approach, the Ninth Circuit's three joint authorship criteria follow from the Second and Seventh Circuit decisions. *See, e.g.*, *Aalmuhammed*, 202 F.3d at 1234 ("In determining whether the

parties have the intent to be joint authors, the Second Circuit looks at who has decision making authority, how the parties bill themselves, and other evidence.") (citing *Thomson*, 147 F.3d at 202-03). For example, the first factor identified in *Aalmuhammed*, that "an author superintends the work by exercising control," is a direct quote from *Thomson*. *Aalmuhammed*, 202 F.3d at 1234.

Petitioners then attempt to point out three ways in which the Ninth Circuit's criteria supposedly conflict with the Second and Seventh Circuit approach. Each of their assertions is patently wrong.

1. There Is No Circuit Conflict Regarding Analysis Of Objective Manifestations Of A Shared Intent To Be Joint Authors.

Contrary to Petitioners' assertion (Pet. 10-11), there is neither a conflict nor an error in the Ninth Circuit's requirement that a court inquire whether the "putative coauthors made objective manifestations of a shared intent to be coauthors." *Aalmuhammed*, 202 F.3d at 1234. In fact, this criteria came directly from the Second and Seventh Circuit decisions. *See, e.g., Thomson*, 147 F.3d at 202-04 ("Under *Childress*, a specific finding of mutual intent remains necessary. We therefore turn to an examination of the factual indicia of ownership and authorship relevant to this inquiry, as they are defined in the prior cases.") (citation omitted).

Petitioners erroneously assert that the Ninth Circuit in *Aalmuhammed* erred because it "misread" the Second and Seventh Circuit decisions. Pet. 10. Petitioners claim that cases such as *Thomson* (2d Cir.) and *Erickson* (7th Cir.) hold only "that an

expressed intent *not* to be joint authors was relevant in determining co-authorship." Pet. 10-11 (emphasis in original). Petitioners could not be more wrong. In fact, these decisions hold exactly the opposite. They hold that a "co-authorship *claimant* bears the burden of establishing that each of the putative co-authors . . . *fully intended* to be co-authors." *Thomson*, 147 F.3d at 200 (emphasis added). *See also Erickson*, 13 F.3d at 1072 ("Because [the claimant] cannot establish the requisite intent for *Much Ado* or *Prairie Voices*, the actors cannot be considered joint authors for the purposes of copyright protection.").

The Ninth Circuit here, in accord with the Second and Seventh Circuits, properly placed the burden on Petitioners to show there were objective manifestations of an affirmative intent to make Richlin a joint author of the Motion Picture. The Ninth Circuit correctly held that Petitioners failed to submit any such evidence. Pet. App. 14a-16a. Contrary to Petitioners' baseless assertions,[3] all of the evidence demonstrated objective manifestations

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[3] Petitioners are wrong to criticize the Ninth Circuit's finding that the Assignment and Employment Agreement were objective manifestations of the parties' intent *not* to be joint authors. Pet. 11 n. 6. The Ninth Circuit quite clearly and correctly held that the Assignment — which assigned all rights, including control and copyright, in the Treatment and any motion picture derived from it, *exclusively* to Mirisch Co. — and the Employment Agreement — in which Richlin agreed that Mirisch Co., as employer for hire, would be the sole "author" of the Motion Picture — were diametrically opposed to any "intent" to be deemed joint authors in the Motion Picture. *See Thomson*, 147 F.2d at 204 n. 25 ("[A] reservation of rights provision 'suggest[s] that the parties did not consider themselves joint authors of a single work.'") (citing *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 22 (2d Cir. 1976)).

of the parties' understanding that Richlin was expressly not intended to be a joint author of the Motion Picture.

2. There Is No Circuit Split Regarding The Significance Of Whether The Alleged Author "Superintended The Work By Exercising Control."

Petitioners erroneously assert that the Ninth Circuit is somehow in conflict with the Second and Seventh Circuits because it "has overemphasized the control factor." Pet. 13.

First, there is no such disagreement among the circuits. Again, as with the development of the "shared intent" criteria, the Ninth Circuit based its "control" criteria on the Second Circuit approach. *See Aalmuhammed*, 202 F.3d at 1234 (citing *Thomson*, 147 F.3d at 202). The same exact "control" or "decision making" criteria are in *Thomson* and *Erickson*. *See Thomson*, at 202-203 ("An important indicator of authorship is the contributor's decision making authority over what changes are made and what is included in a work.")(citing *Erickson*, 13 F.3d at 1071-72). For example, in *Thomson*, the Second Circuit relied in large part on the fact that the playwright Larson had maintained sole overall decision making authority over the creative content of *Rent* in rejecting Thomson's claim to joint authorship of the play. *Thomson*, 147 F.3d at 204.

Petitioners cite to *Berman v. Johnson*, 518 F. Supp. 2d 791, 796-97 (E.D. Va. 2007) as evidence of a purported circuit split on the "control" issue. Pet. 12-13. Specifically, the court in *Berman* stated:

> Defendants cite to the Ninth Circuit's decision in *Aalmuhammed v. Lee*, which held that joint authorship requires a party (i) to make an independently copyrightable contribution and (ii) to establish "authorship" by demonstrating (a) control over the creation of the work, (b) "objective manifestations of a shared intent to be coauthors," and (c) audience appeal based on each contributor's contribution. 202 F.3d 1227, 1232 (9th Cir. 2000). By contrast, the Second and Seventh Circuits hold that authorship of a joint work is established merely by "establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors." *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998).

Berman, 518 F. Supp. 2d at 796-97. The court, apparently accepting the defendants' interpretation that under *Aalmuhammed* joint authorship "requires" control, rejected the purported Ninth Circuit approach stating "[w]hile a strict application of the Ninth Circuit's rule would support defendants' argument, the facts highlight the rule's flaw." *Id.* at 797.

However, with all due respect to the district court in *Berman*, the Ninth Circuit did not impose a "requirement" that there must be control to establish joint authorship. The Ninth Circuit merely noted that "[c]ontrol in many cases will be the most important factor." *Aalmuhammed*, 202 F.3d at 1234. The three criteria identified by the Ninth Circuit in *Aalmuhammed* are simply meant to be a flexible

approach for determining whether the "mutual intent" requirement is met. The Ninth Circuit went on to say, for example:

> The best objective manifestation of a shared intent, of course, is a contract saying that the parties intend to be or not to be co-authors. In the absence of a contract, the inquiry must of necessity focus on the facts. The factors articulated in this decision and the Second and Seventh Circuit decisions cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much.

Aalmuhammed, 202 F.3d at 1235 (emphasis added).

As demonstrated above, the Ninth, Second and Seventh Circuits *all* require the plaintiff to show that all persons "fully intended to be co-authors." Accordingly, there is no circuit split.[4]

Second, even if there were such a split, which there is not, resolution of the issue one way or the other (*e.g.*, whether the court should give more or less significance to the control criteria) would have no impact on the result here. The Court of Appeals gave primary significance, not to the lack of control element, but to the fact that there were work for hire and assignment agreements making it clear, beyond

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[4] For similar reasons, the 2001 student note Petitioners cite (Pet. 9, n. 4) as calling the Ninth Circuit's approach "strikingly different" is fundamentally incorrect. *See* J. David Yarbrough, Jr., Comment, What's Mine Might Be Yours: Why We Should Rethink The Default Rule for Copyright Ownership in Joint Works, 76 Tul. L. Rev. 493, 508 (2001).

any doubt, that the parties, including Richlin himself, never intended Richlin to be a joint author of the Motion Picture.[5] Pet. App. 15a-17a.

3. The Question Of Whether A Joint Author's Contribution Needs To Be "Independently Copyrightable" Played No Role In This Case.

Petitioners next attempt (Pet. 14) to conjure a circuit split on the "independent copyrightability" requirement for joint authorship by citing to Judge Posner's discussion in *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004). However, this also fails.

First, *Gaiman* does not disagree with the requirement that to be a joint author the person's contribution must be independently copyrightable. In fact, Judge Posner states:

> There has to be some original expression contributed by anyone who claims to be a co-author, and the rule (we'll consider an exception momentarily) is that his contribution must be independently copyrightable. *E.g.*, *Erickson v. Trinity Theatre, Inc.*, *supra*, 13 F.3d at 1071; *Aalmuhammed v. Lee*, *supra*, 202 F.3d at 1231.

Gaiman, 360 F.3d at 658 (emphasis in original). The *Gaiman* court merely goes on to discuss how there may be exceptions to this rule due to "the

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[5] Moreover, this is not a case where the contributor had some degree of control such that the significance a court should have accorded the factor would be arguable. Here, it was undisputed that Richlin had absolutely *no control* over any aspect of the Motion Picture. Pet. App. 16a-17a; ER 785.

nature of the particular creative process" that produces the work. *Id.* at 659.

Second, even if there were a circuit split, the "independent copyrightability" of Richlin's contribution was not at issue in this case. The parties assumed, for purposes of the subject motion, that Richlin's contributions to the Motion Picture were sufficiently "independently copyrightable" to satisfy any such requirement for joint authorship. Independent copyrightability played no role in the Ninth Circuit's decision. Because the "mutual intent" requirement was not met here, a decision by this Court on "independent copyrightability" would be immaterial to the resolution of this case. Accordingly, this is not the proper case for review of the "independent copyrightability" requirement.

II. Granting The Writ Would Serve No Practical Purpose, Because Petitioners Waived Their Argument Regarding A Purported Renewal Term Copyright In The Treatment.

Even where an issue of national importance is presented, which it is not here (see Point III below), certiorari may be denied where the Court's resolution of the issue presented would be irrelevant to the ultimate outcome of the case. The Court should deny review of Petitioners' claim (Pet. 16-25) that they are entitled to rights by virtue of the purported renewal term copyright in the Treatment (as distinguished from the Motion Picture) because they expressly waived that claim before the District Court. As the Court of Appeals found:

> . . . by the time the district court granted summary judgment in favor of MGM, the Richlin heirs had abandoned their argument based on a statutory copyright in the Treatment. Instead, they argued that they have a copyright interest in the Motion Picture as coauthors based on Richlin's coauthorship of the Treatment, which was incorporated into the Motion Picture.

Pet. App. 8a (emphasis added). This express abandonment/waiver, which is not challenged in the Petition, provides a wholly-independent basis for affirming the Ninth Circuit's decision, regardless of how this Court rules on the renewal term copyright claim. *See* Pet. App. 8a.

In the Complaint, Petitioners only sought a declaration that they were co-owners (together with Respondents) of a 50% share of the U.S. statutory renewal term copyright in the Treatment. ER 10.[6] Based upon this requested finding, Petitioners then: (i) requested a further declaration that the Motion Picture and all subsequent works "deriving from" the Motion Picture are derivative works of the Treatment, (*id.*); and (ii) sought, *inter alia*, an accounting for 50% of the profits received by Respondents arising out of the alleged exploitation of the Treatment in the Motion Picture and subsequent *Pink Panther* motion pictures during the renewal term of copyright of the Treatment. ER 10, 37.

On summary judgment, Respondents asserted that Petitioners' claims, as alleged in the complaint, failed because there was no independent statutory renewal

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[6] References to the page numbers of the documents contained in Appellants' Excerpts of the Record are cited as "ER __".

copyright in the Treatment, and therefore, nothing that could have vested in Petitioners under § 304 of the Copyright Act. ER 318-25. In their opposition, Petitioners expressly conceded that there was no independent existing copyright in the Treatment.[7] Petitioners instead asserted that their claim was not based on any statutory copyright in the Treatment, but, rather, was based on their new claim that Richlin's contribution to the Treatment made him a joint author of the Motion Picture.[8]

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[7] Petitioners acknowledged this point in multiple places in their opposition memorandum in the district court:

> "Plaintiffs concede that there should be no independent copyright in the Treatment, because the Treatment was incorporated fully into *The Pink Panther*." ER 443.
>
> "But Plaintiffs agree that there is no separate copyright in the Treatment, because it was incorporated in its entirety in the film." ER 444.
>
> "Defendants implicitly recognize this fact by arguing that there should be no separate copyright in the Treatment, a point with which Plaintiffs agree." ER 445.

[8] For example, in their response to Defendants' Statement of Undisputed Facts and Conclusions of Law, Petitioners stated:

> "No. 55 The Treatment does not have an independent copyright which is separate from the statutory copyright in *The Pink Panther*, which is undisputedly owned by Defendants." Response: "Undisputed. Defendants own the statutory copyright, but Plaintiffs have an equitable interest in the copyright." ER 473.
>
> "No. 56 There is no separate statutory renewal term copyright in the Treatment that could have reverted to Plaintiffs under § 304 of the Copyright Act." Response: "Undisputed. But Plaintiffs, as the

At the hearing on the motion, Petitioners again conceded there was no statutory copyright in the Treatment and re-affirmed that they were claiming relief solely based on a finding that Richlin was a joint author of the Motion Picture.[9]

The District Court confirmed that, pursuant to their own urging, Petitioners' *sole* claim in opposition to summary judgment was based on their argument that Richlin was a joint author of the Motion Picture:

> The plaintiffs acknowledge that the Treatment copyright is incorporated into the motion picture's copyright and was renewed by MGM. Their argument is not based on a separate copyright in the Treatment. Instead, they argue that they have copyright rights in the entire motion picture as co-authors of the motion picture based on Richlin's co-authorship of the Treatment.

Pet. App. 39a. (emphasis added).

On appeal, Petitioners retreated from their joint authorship claim and attempted to resurrect their claim based on a purported renewal copyright in the Treatment. Pet. App. 7a-8a. Responden ts opposed, claiming that Petitioners abandoned this argument before the District Court and could not pursue it for

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statutory heirs of a co-author of the copyrighted film, had a right to renew the copyright in the film, just as MGM did." *Id.*

[9] Mr. Schoenberg: "Again, we are not — we are not claiming a separate copyright in the treatment, we're saying that the treatment was merged, as an -- to quote the 1976 Act, 'into inseparable or interdependent parts of a unitary whole,' was merged into the movie." ER 765.

the first time on appeal. *See, e.g., Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996) (declining to decide an issue because "an appellate court will not hear an issue raised for the first time on appeal" and that "[t]o have been properly raised below, the argument must be raised sufficiently for the trial court to rule on it") (citation and internal quotations omitted); *Rothman v. Hosp. Service of S. California*, 510 F.2d 956, 960 (9th Cir. 1975) (declining to decide an issue not properly raised in the court below because plaintiff had "not presented persuasive arguments for making an exception to this rule").

The Ninth Circuit agreed that Petitioners had abandoned their claim based on copyright in the Treatment and on *Stewart v. Abend*. *See* Pet. App. 8a. Accordingly, there is no "compelling reason" for this Court to review this claim.

III. The Decision That There Was No Renewal Term Copyright In The Treatment Is Of Extremely Limited Significance And Does Not Warrant Review.

There is no "compelling reason" to review the renewal term copyright issue in this case because time has essentially run out for these kinds of claims.[10] The last renewal term copyright for any work subject to the 1909 Act's two-term system commenced on January 1, 2006. Given the Copyright Act's three-year statute of limitations, the number

[10] In fact, here, in addition to defending on the merits, Respondents asserted below that Petitioners' claims failed because they were time-barred by the statute of limitations and laches.

of cases, if any, to which a ruling on this issue would apply is extremely limited and becoming smaller each day.

By way of background, prior to January 1, 1978, U.S. copyright law was governed by the 1909 Act. Under the 1909 Act, federal statutory copyright protection *only* commenced upon the earlier of either (a) publication of a work with proper copyright notice; or (b) registration of the work with the Copyright Office. The duration of copyright protection under the 1909 Act was for two terms, an original and a renewal term, of 28 years each.

Congress substantially revised U.S. copyright law when it passed the Copyright Act, which became effective on January 1, 1978. The Copyright Act, as amended, eliminated the two 28-year term system in favor of a single term lasting the author's life plus seventy years. Most importantly, especially for the present case, the Copyright Act eliminated the 1909 Act's system of requiring registration or publication of a work in order to invest it with statutory copyright protection. Instead, federal statutory "[c]opyright in a work created on or after January 1, 1978 subsists from its creation . . . ." 17 U.S.C. § 302(a).

The last original term of copyright created under the 1909 Act ended on December 31, 2005 (*i.e.*, the end of the 28th calendar year of the initial term of copyright for works registered for copyright or first published in 1977, the last year of the 1909 Act). As of January 1, 2006, the time ran out to timely renew copyrighted works subject to the 1909 Act's two term system. Accordingly, while works subject to two-term copyrights can still be registered for renewal, those

renewals will no longer be "timely" and have lost some of the incentives provided in the Copyright Act, including the ability to cut off the rights of an owner of an existing derivative work prepared during the original term of copyright. *See, e.g.*, 17 U.S.C. § 304(a)(4)(A).

The renewal copyright issue in the Petition will rarely, if ever, arise again because, as noted above, the last date for commencement of the renewal term copyright for any work covered by the 1909 Act passed in 2006. This means that any statutory successor who did not file a registration for the renewal copyright by December 31, 2005, will not have the right to make any claims against any derivative works created during the original term of copyright. 17 U.S.C. § 304(a)(4)(A). Also, the Copyright Act's statute of limitations for claims seeking to establish copyright ownership or authorship is three years. Accordingly, such claims will soon be forever time-barred by the statute of limitations and/or by laches. Thus, the petition seeks to have this Court revisit *Stewart v. Abend* when there are likely to be only few, if any, similar cases going forward.[11]

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[11] Petitioners argue that a similar issue could be raised in the context of termination rights under § 304(c) of the Copyright Act. This case, like *Stewart*, does not involve termination rights and is not the proper vehicle for the Court to review such an issue.

IV. The Ninth Circuit's Decision That There Was No Cognizable Renewal Copyright In The Treatment Was Correct And Does Not Conflict With *Stewart v. Abend*.

As Petitioners undoubtedly recognized when they abandoned it before the District Court, their argument that they might have some right to a renewal copyright in the Treatment is without merit. As Petitioners conceded, because the Treatment was never separately copyrighted and was merely an incorporated component of the Motion Picture, there is *no* independent statutory copyright in the Treatment. ER 445, 473. The Ninth Circuit correctly concluded that without such an independent, separately registered statutory copyright for the Treatment, there cannot be a renewal term copyright of the Treatment. *See* Pet. App. 30a-32a. There were no renewal rights in the Treatment that could have ever vested in Petitioners under § 304(a) of the Copyright Act. *Id.*

A. Without A Statutory Renewal Term Copyright In The Treatment There Is No "Other Cognizable Copyright Interest" In The Treatment That Could Have Vested In Petitioners Under § 304.

To the extent Petitioners can claim to have rights in the purported copyright in the Treatment, it is solely by virtue of the renewal term vesting provisions of § 304(a) of the Copyright Act (which incorporates the pertinent provisions from its statutory predecessor, § 24 of the 1909 Act). *See Stewart*, 495 U.S. at 217.

Section 304(a) provides solely for the vesting and renewal of a "*copyright*." The courts have confirmed that Congress' use of the term "copyright" in the 1909 Act refers exclusively to "statutory copyrights." *See Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998); *accord Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 592 (2d Cir. 1999). Since § 304(a) incorporated the pertinent provisions from § 24 of the 1909 Act, *see Stewart*, 495 U.S. at 219, these cases also confirm that the use of the term "copyright" in § 304(a) refers solely to a "statutory copyright."

Accordingly, Petitioners could only succeed on their claim based upon the Treatment if there was an independently existing statutory copyright in the Treatment that vested in them pursuant to § 304(a). *See, e.g., Stewart*, 495 U.S. at 219. Here, however, there is no such copyright in the Treatment.

Petitioners conceded as much when, in their Statement of Genuine Issues of Fact and Conclusions of Law, Petitioners responded to Respondents' assertion that "[t]here is no separate statutory renewal term copyright in the Treatment that could have reverted to Plaintiffs under § 304 of the Copyright Act" as follows:

> "56. Undisputed. But Plaintiffs, as the statutory heirs of a co-author of the copyrighted film, had a right to renew the copyright in the film, just as MGM did."

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B. The Ninth Circuit's Opinion Does Not Conflict With *Stewart v. Abend* Because There Is No Statutory Copyright In The Underlying Work Here.

Despite these authorities and clear principles, Petitioners maintain that, pursuant to the Supreme Court's decision in *Stewart v. Abend,* as the putative statutory successors of a joint author of the Treatment, they must somehow be entitled to some kind of interest in some renewal copyright. *See* Pet. 17-18. However, the Ninth Circuit correctly held that *Stewart* does not provide any support for a claim that is not based on a separate, pre-existing statutory copyright in a separate underlying work. Pet. App. 25a-28a.

Stewart confirmed that the rights of the owner of the copyright in a pre-existing work are not extinguished once it is incorporated into the derivative work, assuming the author of the pre-existing work has agreed to assign his renewal rights. *Stewart*, 495 U.S. at 216, 222-24. This holding, however, was made *solely* with respect to existing *statutory* copyrights in pre-existing works. This distinction is determinative here. In *Stewart*, the plaintiff held a separate statutory renewal copyright in the pre-existing underlying work. Here, there is no statutory renewal copyright for the Treatment. Without a statutory copyright, there cannot be any claim under § 304(a) or under *Stewart*.

Contrary to Petitioners' assertion, this does not require a finding, purportedly in conflict with *Batjac* or *Stewart*, that the Treatment was not in fact published with the Motion Picture. Rather, it rests

on the fact that the Treatment was an incorporated work that never had a statutory copyright. In *Batjac*, the Ninth Circuit distinguished *Stewart* on a similar basis:

> The Supreme Court affirmed this court's holding, finding that under § 24 [of the 1909 Act] the copyright in a pre-existing work is not extinguished during the renewal period with respect to its incorporation into the derivative work. *Id.* at 216, 110 S.Ct. 1750.
>
> The case did not involve common law copyrights. "It Had to Be Murder" was a statutorily copyrighted story whose motion picture rights had been sold to predecessors of Hitchcock and Stewart. Hitchcock and Stewart acquired the rights and made the movie "Rear Window." Any applicability of § 7 to an unpublished or common law protected right was not at issue.

Batjac, 160 F.3d at 1231 (citing *Stewart*) (emphasis added).

Similarly, in the *Husbands* decision cited by the Ninth Circuit (Pet. App. 28a-30a), the Copyright Office Board of Appeals rejected the same argument asserted here by Petitioners. In rejecting the Cassavetes heirs' claim that they must be entitled to renewal rights in the screenplay pursuant to *Stewart*, the Copyright Office ruled:

> Again, the lack of copyright registration for the original term for the screenplay considered by the Office to be authorship intimately intertwined in the integrated whole of the motion picture — which was registered for its original term of copyright — prevents a separate

> renewal registration for the screenplay which under Office registration practices cannot be said to be analogous to the *Stewart v. Abend* story which was incorporated not into an integrated, larger whole but into a composite, or collective, work [*i.e.*, the magazine in which the "It Had to Be Murder" story was first published] in which the contributions sustained their independent identities.

Husbands Decision at 8.

In § 304(a), Congress provided for the author, or his widow and children if the author did not survive, to have an opportunity to partake in the success of a work that had its own, independent statutory copyright (*i.e.*, it had been published with notice or registered), by granting them the right to claim the statutory renewal copyright for that specific work. *See, e.g., Stewart*, 495 U.S. at 218-19. By its express terms, § 304(a) provides solely for the vesting of statutory copyrights, and not for the vesting of some "other interest" in a preliminary work that was merely an incorporated component of a final work and never separately copyrighted.[12] The Ninth Circuit, thus, correctly held that Petitioners have no basis for any of their claims as purported co-owners of the renewal term copyright in the Treatment.

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[12] If Petitioners were to prevail on their renewal claim based upon the Treatment, it would create vast uncertainty in the market for any work, such as a motion picture, that had unregistered incorporated components. Parties, such as assignees and licensees of rights in the motion picture, would have no means of determining from Copyright Office records whether an unregistered renewal term copyright in an incorporated component had vested in a party other than its assignor. *See Husbands* Decision at 6.

CONCLUSION

Respondents respectfully request that, for the foregoing reasons, the petition be denied.

Dated: New York, New York
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IN THE

Supreme Court of the United States

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS, ABIGAIL RICHLIN SCHWARTZ, LOUISE RICHLIN, ELYSSA PARTON and MICHELLE FORKEL,

Petitioners,

v.

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

I. THE SUPREME COURT SHOULD RESOLVE ALL THE CONFLICTS BY DEFINING JOINT AUTHORSHIP.

A. The Issue Of Defining Joint Authorship Is Important And Ripe For Review.

The Supreme Court has squarely addressed the definition of the constitutional term "author" only once, in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S. Ct. 279, 28 L. Ed. 349 (1884). The Court has never defined joint authorship, having remanded the issue without further discussion in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) ("*Community*"), citing only the statutory requirement that the work be prepared by the parties "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* at 754, quoting 17 U.S.C. § 101.

Since *Community*, the circuit and district courts — in *Childress*, *Thomson*, *Erickson*, *Gaiman*, *Aalmuhammed*, *Richlin*, and many other cases — have attempted unsuccessfully to develop standards that might define joint authorship, while limiting the statutory definition to exclude "overreaching contributors."[1] The failure of these efforts is manifest

[1] *See Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Gaiman v.* (Cont'd)

in this case, in which the Academy Award-winning author[2] who originated and first wrote *The Pink Panther* was found not to be the author of the film, story or characters he conceived and created.[3] In *Community*, the Court granted certiorari to resolve conflicting standards for determining the existence of a work for hire relationship, but remanded and did not reach the question of joint authorship. The *Richlin* case presents the proper vehicle for squarely addressing the definition of joint authorship to determine which, if any, of the various differing and conflicting tests created by the circuit and district courts in the twenty years since *Community* is in fact appropriate.

(Cont'd)

McFarlane, 360 F.3d 644 (7th Cir. 2004); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Richlin v. Metro-Goldwyn-Mayer Pictures Inc.*, 531 F.3d 962 (9th Cir. Cal. 2008).

[2] Maurice Richlin had been nominated twice in 1959, for both *Pillow Talk* and *Operation Petticoat*. He won the Oscar for his screenplay for *Pillow Talk*.

[3] The Ninth Circuit's mechanical three-pronged test, with its emphasis on the "control" factor is clearly wrong. Imagine if, on the same facts, the producer had decided to publish Richlin's assigned treatment as a short comic book with some illustrations added. *Cf. Gaiman, supra.* The analysis of the Ninth Circuit's first two factors (intent and control) would be unchanged because both of those factors have **nothing to do with the content of the final published work**. Richlin would again lose 2-1 and would not be the "author" of his own story – an absurd result. Clearly the third factor, the author's contribution to the final product, should in this case be the most important factor in the analysis. The Ninth Circuit's test, and the result in this case, is simply wrong.

The facts of this case are undisputed, uncomplicated and frequently recurring. Richlin assigned his unpublished literary work to a producer (whom he selected) to adapt his story into a motion picture. This scenario has no doubt occurred countless times before, and will continue to occur in the future. The questions presented: whether Richlin is a joint author of the motion picture he originated, and whether Richlin's heirs obtained renewal term rights under *Stewart v. Abend*, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990), are questions the answers to which will determine the rights of many, many authors and their heirs to numerous copyrighted works.[4] The decision in

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[4] The decision concerning joint authorship would reach far beyond the entertainment field. For example, joint authorship is often an issue with architectural drawings, software, papers in academic and scientific fields, and even storage contracts. *See, e.g., M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486 (11th Cir. 1990) (homeowner was not joint author of architectural plans); *Nordstrom Consulting, Inc. v. M&S Technologies, Inc.*, 2008 U.S. Dist. Lexis 17259, *13 (N.D. Ill. 2008) (defendant gave "directions and ideas" but was not joint author of visual acuity software); *Seastrunk v. Darwell Integrated Tech., Inc.*, 2008 U.S. Dist Lexis 26498, *23 (N.D. Tex. 2008) (defendant was not joint author of air conditioner software); *Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1997) (electrical engineering professor and graduate student were joint authors of scientific paper); *Pods, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007) (remanding for jury trial on joint authorship of mini-storage agreement). Of course, joint authorship disputes arise perhaps most often in the entertainment field. For cases decided in the past year, *see, e.g., Handyman Show, Inc. v. Emmis Television Broadcasting, L.P.*, 2008 U.S. Dist. Lexis 72561 (E.D.La. 2008) (actor and producer could be co-authors of television show); *Ortiz v. Guitian Bros. Music Inc.*, 2008 U.S. Dist. Lexis 75455 (Cont'd)

this case will therefore be of far-reaching importance to a great number of people, indeed to each and every author, as well as the author's heirs.[5]

B. The Circuit And District Courts Are "Split" And "Uncertain" Over The "Competing" Definitions Of Joint Authorship.

There is admitted confusion throughout the circuit and district courts on how to assess joint authorship claims. For example, three different district courts in the Sixth Circuit have recently concluded that:

> there is **general uncertainty in the law** as to which test should be used to determine whether an individual's contribution rises to the level of a joint authorship.

(Cont'd)

(S.D.N.Y. 2008) (composer of film score claimed to be joint author of film); *Latimer v. Roaring Toyz, Inc.*, 550 F. Supp. 2d 1345, 1356-57 (M.D. Fla. 2008), vacated on other grounds, 2008 U.S. Dist Lexis 27052 (M.D.Fla. 2008) (defendants who offered suggestions were not joint authors of motorcycle parts photographs); *Sebastian Music Group, Inc. v. Ayala-Rodriguez*, 2008 U.S. Dist. Lexis 28517 (D.P.R. 2008) (dispute over joint authorship of sound recordings); *Lopez v. Musinorte Ent. Corp.*, 2007 U.S. App. Lexis 4035 (9th Cir. 2007) (dispute over joint authorship of songs); *Jordan v. Sony BMG Music Entm't, Inc.*, 2008 U.S. Dist. LEXIS 96515 (S.D. Tex. 2008) (dispute over joint authorship of songs).

[5] It almost goes without saying that a Supreme Court decision in this case, defining joint authorship, would be of landmark importance to the field of Copyright Law and would necessarily be featured prominently in every Copyright textbook and treatise.

See Tacori Enters. v. Rego Mfg., 2008 U.S. Dist Lexis 73686 (N.D. Ohio Sept. 25, 2008) (emphasis added), citing *Tang v. Putruss*, 521 F. Supp. 2d 600, 605 (E.D. Mich. 2007); *see also Automated Solutions Corp. v. Paragon Data Systems, Inc.*, 2008 U.S. Dist. Lexis 45914, *25-*26 (E.D. Ohio 2008) (citing "**ongoing debate** as to whether each contribution must be separately copyrightable").

Similarly, in the Fourth Circuit, Judge Gregory (in dissent) has noted that "[b]ecause the statute does not define the term 'authors,' **two competing interpretations** have emerged." *Brown v. Flowers*, 196 Fed. Appx. 178, 186-87 (4th Cir. 2006) (emphasis added); *see also Berman v. Johnson*, 518 F. Supp. 2d 791 (E.D.Va. 2007) (highlighting the "**circuit split** regarding the requirements for joint authorship" and declining to follow Ninth Circuit test).

And while a district court in Illinois recently stated that "[j]oint ownership of a copyright results only if the parties intended to be joint authors at the time the work was created," a district court in New York has recently called the very same argument "incorrect." *Compare Nordstrom Consulting, Inc.*, 2008 U.S. Dist. Lexis 17259, at *12-13 (N.D.Ill. 2008) *with Mikhlyn v. Bove*, 2008 U.S. Dist. Lexis 81617, at *54 (E.D.N.Y. 2008) ("Counterclaimants also incorrectly argue that 'to be a joint work the authors must intend that.'").

As demonstrated in the Petition, the mechanical, three-pronged test for joint authorship invented by the Ninth Circuit in *Aalmuhammed* and re-applied in *Richlin* conflicts substantially with the various different

and often conflicting standards used by the Second[6] and Seventh Circuits[7], and no other circuit or district court in the country has adopted the Ninth Circuit's approach since it was unveiled eight years ago.

The Court should grant review to resolve the multiple conflicts between the circuits, and clear up the reigning confusion in the lower courts on the frequently recurring question of joint authorship.

The Court should not allow the circuit conflicts to continue, because they appear very likely to remain unresolved, and the continuing confusion will generate more uncertainty and cause harm to a great number of authors and their families. Because of the Copyright

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[6] Compare the various Learned Hand opinions affirming joint authorship — *Maurel v. Smith*, 220 F. 195 (D.N.Y. 1915) (L. Hand, J.), *aff'd* 271 F. 211 (2d Cir. 1921); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820, 67 S. Ct. 1310, 91 L. Ed. 1837 (1947) — with the more recent opinions denying joint authorship in *Childress* and *Thomson*. The Learned Hand opinions obviously informed the statutory definition of joint authorship set forth in 17 U.S.C. § 101. However, "in order to address the concern of overreaching contributors, the Second Circuit set forth a more exacting standard than the statutory definition." *Price v. Fox Entm't Group, Inc.*, 473 F. Supp. 2d 446, 454 (S.D.N.Y. 2007).

[7] Note the disagreement within the Seventh Circuit between Judge Posner's opinion affirming joint authorship of a comic strip character (Spawn) in *Gaiman*, 360 F.3d 644, and the earlier opinion denying joint authorship in *Erickson*, 13 F.3d 1061.

Act's fee-shifting statute, 17 U.S.C. § 505,[8] it is very risky for authors and their heirs to assert their rights when those rights are in dispute. Indeed, even in this case MGM has sought over $850,000 in fees (which thankfully have been denied because the district court found the claims "colorable"). No doubt other claimants will be deterred from bringing similar claims as a result of the decision in this case, if it is allowed to stand. Because the Ninth Circuit held that an author who assigned his unpublished work to a producer was not an author of a copyrighted work, not only renewal rights under § 304(a) were denied, but also by extension an author and his heirs have no right to take advantage of the extended copyright term provided in § 302(c) and the termination provisions of § 304(c). Therefore, it is likely that the decision, until it is reversed or overruled, will affect the duration, renewal and termination rights of thousands and thousands of authors and their families, depriving them of the benefits the Copyright Act seeks to provide them.

II. THE NINTH CIRCUIT'S RULING SO GREATLY CONFLICTS WITH PRIOR SUPREME COURT RULINGS ON RENEWAL RIGHTS THAT IT SHOULD BE REVIEWED NOW.

The Supreme Court has at least three times previously resolved issues concerning copyright renewal terms. First, in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 53 S. Ct. 773, 87 L. Ed. 1055 (1943), Justice Frankfurter's opinion confirmed that an author

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[8] *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

may assign his renewal term interest before the expiration of the original term. Next, in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 80 S. Ct. 792, 4 L. Ed. 2d 804 (1960), Justice Douglas's opinion held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues. Finally, in *Stewart*, Justice O'Connor's opinion held that if an author has assigned a portion of the renewal rights, such as the right to produce a derivative work, but dies before the commencement of the renewal period, the assignee may properly continue to use the original work into the renewal period only if the author's successor transfers the renewal rights to the assignee. As a result, the film *Rear Window* could not be distributed without a new license from the owner of the underlying story during the story's renewal period.

The decision of the Ninth Circuit in the present case is in direct conflict with *Miller* and *Stewart*, essentially limiting the holdings of those cases to underlying works that had been separately published prior to assignment to a publisher or producer. *Stewart* has been cut in half, at least, by the Ninth Circuit. *Stewart*'s holding applies when an author assigns a published story to a producer to make a film, but not, in perhaps the more common case, when an author assigns an unpublished story. The distinction made by the Ninth Circuit makes no sense in the context of the Copyright Act, which since 1909 has expressly omitted any requirement that an author obtain copyright protection prior to assignment of his work to a publisher. *See Abend v. MCA, Inc.*, 863 F.2d

1465, 1470 (9th Cir. 1988); *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 402 (2d Cir. 1970). The Ninth Circuit's truncation of *Stewart* needs to be corrected.

It took thirteen years from when the Supreme Court denied certiorari in *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S. Ct. 2666, 53 L. Ed. 2d 266 (1977) until the Court took up a conflicting decision in *Stewart* and finally overruled *Rohauer*. During that period, no doubt many authors failed to assert their rights, especially in the Second Circuit, fearing that *Rohauer* would control the outcome and they would be liable for attorney's fees upon defeat. It took a brave claimant in the Ninth Circuit to challenge and ultimately correct the ruling. The Court should not allow the incorrect ruling in *Richlin* to percolate before it too is overruled. In the meantime, thousands of authors and their heirs will be deprived of the benefits of the Copyright Act.

The assertion that Petitioners have ever "abandoned" or "waived" their claim based on *Stewart* is, sadly, completely false. If true, the Ninth Circuit would hardly have bothered to spend half its opinion attempting to circumvent the claim. Beginning with the Complaint, and continuing through every brief and hearing in this case, Petitioners have made the very same argument (willfully misunderstood by Respondents and misconstrued by the courts): Maurice Richlin is indisputably the author of *The Pink Panther* and his heirs are entitled, under *Stewart*, to renewal term rights in his work, which is a "**copyrighted work**" included in § 304(a) — indeed, one of the most successful copyrighted works in the history of film.

CONCLUSION

Therefore, Petitioners respectfully request that this Court grant the Petition for a writ of certiorari.

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